IN THE SUPREME COURT OF THE UNITED STATES

October Term 1926-7

WESTERN UNION TELEGRAPH COMPANY,
A CORPORATION,
Petitioner,

v.

C. H. PRIESTER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

This is a petition to review a judgment of the highest Alabama court in which a decision could be had, which in a case concededly governed by the Federal law, has refused to follow and apply a recent, well-considered and controlling decision of this court. The Federal question was raised at the outset and persistently preserved throughout.

In *Western Union* v. *Czizek*, 264 U. S. 281 (1924) the question was presented to this court whether a telegraph company could be held liable for failure of duty in connection with an interstate message beyond the sum at which the message was *valued* by the sender. The circuit court of appeals had held, and the case was argued in this court

by both sides on the theory, that, if it made any difference with respect to the telegraph company's liability beyond the amount of the valuation in such a case whether its negligence had been ordinary or "gross" negligence, the negligence in that case was "gross". There had been a complete failure to transmit the message from the office of origin, and in addition to that the company had mistakenly informed the sender, when he inquired, that the message had been duly sent. This court held that the addition of a vituperative epithet to the admitted fault did not authorize a recovery beyond the amount at which the message was valued.

In the present case, an interstate message was sent under the same message classifications which were applicable in the Czizek case, and, as in the Czizek case, the message was valued by the sender at $50.00. The only fault was a simple error in transmission. There was no evidence and no claim of any wilful wrong. The jury was permitted to find that the negligence was "gross"; and on the strength of this finding the State court has allowed a recovery of the full amount of the loss, which was in excess of the valuation. It has simply refused to follow the controlling decision of this court in the Czizek case.

There is a second question involved. It is the contention of petitioner that since the relations between a telegraph company and the sender of an interstate or foreign message have ceased to be simply relations of contract and have become relations in which the rights and liabilities of the parties are fixed by law (*Western Union Telegraph Company v. Esteve Brothers*, 256 U. S. 566, decided 1921), it is immaterial whether the telegraph company's negligence is "gross" or simple, not only with respect to the provision of the message tariffs limiting recovery to the amount at which the message is valued by the sender, but also with respect to the separate provision of the message

tariffs limiting the liability of the company to a still smaller amount when the message was *unrepeated*. This question was argued in the Czizek case, but not decided by the court, for the reason that, as the court construed the message tariff, the clause limiting the company's liability for unrepeated messages was held not to be intended to apply to a total failure to transmit the message from the point of origin, which was the nature of the default in that case. But in the present case there is no dispute that, if valid, the provision restricting the liability of the defendant for errors in unrepeated messages applies; and it therefore becomes necessary to determine whether the effect of this provision, in a case to which it is clearly applicable, can be avoided by State courts through the simple expedient, every time the question arises, of leaving it to the jury to say whether the negligence resulting in a simple error, admittedly without wilful intent, was "gross".

We believe that the foregoing statement sufficiently shows the importance of the case and the propriety of issuing the writ under the rules which the court has announced as governing its action on these applications. A somewhat more detailed statement of the manner in which the issues were presented and the Federal question raised follows.

The message on which the suit is based was sent by respondent, Priester, from Ft. Deposit, Alabama, to New Orleans, La. Petitioner did not maintain an office at Ft. Deposit and the message was sent over the telephone from Ft. Deposit to Greenville, Alabama, where it was written down by the telegraph operator on one of the regular sending blanks of the company and forwarded over the wires of the petitioner to New Orleans. As sent over the wires of the company from Greenville to New Orleans, the message read as follows:

"Ft. Deposit, Ala. 12-16-1919. J. K. Lewis, 411 Poydras Street, New Orleans, La. Offer you one thousand or fifteen hundred pounds Frotchers pecans at *50c* f. o. b. Ft. Deposit. Answer. C. H. Priester."

The message was correctly transmitted to the main office of petitioner at New Orleans but in relaying it between branch offices maintained by the company to expedite business in the downtown section of New Orleans, it was altered to read:

"J. K. Lewis, N. O. La. Offer you 1000 or 1500 pounds Frothiers at *15 cents* f. o. b. Deposit. Answer. C. H. Priester."

Upon receipt of the message by Lewis, he telegraphed respondent, Priester, that he would take 1500 pounds of pecans offered and in reliance upon such message, respondent Priester shipped to Lewis 1006 pounds of pecans and received pay therefor at the rate of 15c per pound instead of 50c per pound as originally offered by him.

On July 21, 1920, respondent Priester filed suit for damages against petitioner in the circuit court of Butler County, Alabama, the complaint consisting of a single count alleging negligence in the transmission of the telegram. There were three trials of the suit in the circuit court of Butler County, and the pleadings were several times amended. For the purposes of this petition it will suffice to say that the trial as finally had was upon two counts alleging *gross* negligence on the part of the defendant's agents or employes in and about the transmission and delivery of the message and special pleas setting up two separate Federal defenses: (1) The interstate nature of the message; that it was sent as an unrepeated message and under the company's rules, regulations and tariffs on file with the Interstate Commerce Commission the damages were limited to

the amount paid for sending the message; (2) that the message was an interstate message and that under the company's rules, regulations and tariffs on file with the Interstate Commerce Commission at the time of sending the message the company's liability was limited to $50.00 at which the said message had been valued by the sender. The Federal defenses were raised at every stage of the proceeding, including pleas to the original and amended complaints, rulings on pleadings, on the admission of evidence, requested charges and motion for a new trial.

On the last trial the circuit court of Butler County submitted the case to the jury solely on the issue of gross negligence on the part of the petitioner's servants or agents in and about the transmission of the message and charged the jury that if under the evidence the jury should find that the agents of the defendant "did not bestow the care and skill which the situation demanded they should bestow", the plaintiff could recover. The jury returned a verdict for respondent Priester for $514.07 and judgment was entered accordingly. After the trial court had overruled a motion for a new trial, which again raised the Federal defenses, an appeal was taken to the Court of Appeals of Alabama, which court has final jurisdiction of suits at law where the amount involved does not exceed $1,000.00. (Code Alabama 1923, Sec. 7309). The Court of Appeals of Alabama on the 26th day of October, 1926, affirmed the judgment of the circuit court of Butler County. Whereupon, petitioner on the 4th day of November, 1926, filed an application in said Court of Appeals of Alabama for a rehearing, which said petition for a rehearing was denied on the 9th day of November, 1926. Thereupon, petitioner on the 22nd day of November, 1926, filed in the Supreme Court of Alabama, which court under Sec. 140 of the Constitution of Alabama has supervisory power over the Court of Appeals, a petition in strict accordance with rule 44 of the said Su-

preme Court (Code of Alabama, 1923, Volume IV, p. 894) for a writ of certiorari to the Court of Appeals to review and determine the decision rendered by the Court of Appeals in said cause on the 26th day of October, 1926, and in support of said petition for certiorari in the Supreme Court, did file a brief and argument as required by the rules of said court; and on the 13th day of January, 1927, the Supreme Court of Alabama entered an order denying said petition for certiorari, whereupon the decision and judgment of the Court of Appeals of Alabama became absolutely final and petitioner now has no other remedy in the courts of Alabama.

The reasons relied on for the allowance of the writ of certiorari from the Supreme Court of the United States to the Court of Appeals of Alabama are as follows:

1st. The Court of Appeals of Alabama erred in affirming a judgment against petitioner for more than $50.00, based on *gross* negligence on the part of petitioner's agents on account of an error made in the transmission of an interstate telegraphic message not specially valued by the sender, where liability for such default was specially limited to the sum of $50.00 by the company's tariffs and classifications on file with the Interstate Commerce Commission; such decision of the Court of Appeals being in conflict with the decision of this Court in the case of *Western Union Telegraph Company v. Czizek*, 264 U. S. 281.

2nd. The Court of Appeals erred in affirming a judgment against petitioner for more than the toll paid, based on *gross* negligence on the part of petitioner's agents on account of an error made in the transmission of an unrepeated interstate telegraphic message, where liability for such default was limited to the toll paid by the company's tariffs and classifications on file with the Interstate Commerce Commission; such decision of the Court of Appeals

of Alabama being probably not in accord with applicable decisions of this Court.

Your petitioner believes that the aforesaid judgment of the Court of Appeals of Alabama is erroneous and that this Honorable Court should require the said case to be certified to it for its review and determination in conformity with the provisions of the Act of Congress and the rules of this Honorable Court in such cases made and provided.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Court of Appeals of Alabama, commanding the said Court to certify and send to this Court on a day certain to be designated therein, a full and complete transcript of the record and all proceedings of the said Court of Appeals of Alabama in said case therein entitled *Western Union Telegraph Company, Appellant, v. C. H. Priester, Appellee*, 3rd Division, No. 532, to the end that the said case may be reviewed and etermined by this Court as provided in Judicial Code, Sec. 237 (b) as amended by the Act of February 13, 1925; or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said Act, and that the said judgment of the said Court of Appeals of Alabama in said case and every part thereof may be reversed by this Honorable Court and your petitioner will ever pray.

FRANCIS R. STARK,

RAY RUSHTON,

Attorneys for Petitioner.

STATE OF ALABAMA,
MONTGOMERY COUNTY

Ray Rushton, being duly sworn, deposes and says that he is one of the attorneys for the petitioner in the foregoing petition and has read the same; that he is duly authorized to make this affiadvit on behalf of said petitioner; that the same is true to his own knowledge, information and belief, that his knowledge is derived from the record in the case and from what has taken place in his presence and hearing in the courts in which said action has been heard.

RAY RUSHTON.

Sworn to and subscribed before me this the 19th day of February, 1927.

John P. Kohn Jr.
Notary Public.

My commission expires 8th day of November

1930.

I HEREBY CERTIFY that I have examined the foregoing petition and in my opinion the petition is well founded and that the case is one in which the prayer of the petiioner should be granted by this Court.

RAY RUSHTON,
Of Counsel for Petitioner.

WESTERN UNION TELEGRAPH COMPANY,
Petitioner,

v.

C. H. PRIESTER,
Respondent.

IN THE SUPREME COURT OF THE UNITED STATES.

The Clerk will enter our appearance as counsel for the petitioner.

FRANCIS R. STARK,
RAY RUSHTON.

WESTERN UNION TELEGRAPH COMPANY,
Petitioner,

v.

C. H. PRIESTER,
Respondent.

IN THE SUPREME COURT OF THE UNITED STATES.

I, D. M. Powell of Greenville, Alabama, of counsel for Respondent C. H. Priester, in the above entitled cause and in all its phases, hereby accept full service of the copy of the petition, printed record and supporting brief in said Court and waive all other further notice and consent that the said submission of said petition for certiorari may be made in said Supreme Court.

This the_____day of February, 1927.

D. M. POWELL,
Of Counsel for Respondent.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1926-7

WESTERN UNION TELEGRAPH COMPANY,
A CORPORATION,
Petitioner,

v.

C. H. PRIESTER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA.

To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

This is a petition for certiorari in the same cause and for the purpose of presenting the same question as the petition in Number 916 submitted herewith. Since that petition was filed there has been published in the Southern Reporter (111 So. 199) a short memorandum handed down by the Supreme Court of Alabama in connection with the denial of certiorari to the Court of Appeals of Alabama as follows:

"Writ denied on authority of *Postal Telegraph Company v. Minderhout*, 195 Ala. 420."

While counsel for petitioner are reasonably satisfied that the writ of certiorari should run from this court to the Court of Appeals of Alabama, nevertheless, because of

some uncertainties which still remain in view of what was said in *Matthews v. Huwe*, 269 U. S. 262, (Adv. Op. U. S. Sup. Ct. 70 L. Ed. 119) it has been thought not improper out of abundant caution to ask at the same time for a writ directed to the Supreme Court of the State of Alabama.

This petition is, therefore, to review the judgment of the Supreme Court of Alabama (Or. 148) denying a writ of certiorari to the Court of Appeals of Alabama which in a case concededly governed by the Federal law, has refused to follow and apply a recent well-considered and controlling decision of this court. The Federal question was raised in the outset and persistently preserved throughout and was insisted on in petitioner's application to the Supreme Court of Alabama.

In *Western Union v. Czizek*, 264 U. S. 281 (1924) the question was presented to this court whether a telegraph company could be held liable for failure of duty in connection with an interstate message beyond the sum at which the message was *valued* by the sender. The circuit court of appeals had held, and the case was argued in this court by both sides on the theory, that, if it made any difference with respect to the telegraph company's liability beyond the amount of the valuation in such a case whether its negligence had been ordinary or "gross" negligence, the negligence in that case was "gross". There had been a complete failure to transmit the message from the office of origin, and in addition to that the company had mistakenly informed the sender, when he inquired, that the message had been duly sent. This court held that the addition of a vituperative epithet to the admitted fault did not authorize a recovery beyond the amount at which the message was valued.

In the present case, an interstate message was sent under the same message classifications which were applica-

ble in the Czizek case, and, as in the Czizek case, the message was valued by the sender at $50.00. The only fault was a simple error in transmission. There was no evidence and no claim of any wilful wrong. The jury was permitted to find that the negligence was "gross"; and on the strength of this finding the State court has allowed a recovery of the full amount of the loss, which was in excess of the valuation. It has simply refused to follow the controlling decision of this court in the Czizek case.

There is a second question involved. It is the contention of petitioner that since the relations between a telegraph company and the sender of an interstate or foreign message have ceased to be simply relations of contract and have become relations in which the rights and liabilities of the parties are fixed by law (*Western Union Telegraph Company v. Esteve Brothers*, 256 U. S. 566, decided 1921), it is immaterial whether the telegraph company's negligence is "gross" or simple, not only with respect to the provision of the message tariffs limiting recovery to the amount at which the message is valued by the sender, but also with respect to the separate provision of the message tariffs limiting the liability of the company to a still smaller amount when the message was *unrepeated*. This question was argued in the Czizek case, but not decided by the court, for the reason that, as the court construed the message tariff, the clause limiting the company's liability for unrepeated messages was held not to apply to a total failure to transmit the message from the point of origin, which was the nature of the default in that case. But in the present case there is no dispute that, if valid, the provision restricting the liability of the defendant for errors in unrepeated messages applies; and it therefore becomes necessary to determine whether the effect of this provision, in a case to which it is clearly applicable, can be avoided by State courts through the simple expedient,

every time the question arises, of leaving it to the jury to say whether the negligence resulting in a simple error, admittedly without wilful intent, was 'gross".

We believe that the foregoing statement sufficiently shows the importance of the case and the propriety of issuing the writ under the rules which the court has announced as governing its action on these applications. A somewhat more detaailed statement of the manner in which the issues were presented and the Federal question raised follows.

The message on which the suit is based was sent by respondent, Priester, from Ft. Deposit, Alabama, to New Orleans, La. Petitioner did not maintain an office at Ft. Deposit and the message was sent over the telephone from Ft. Deposit to Greenville, Alabama, where it was written down by the telegraph operator on one of the regular sending blanks of the company and forwarded over the wires of the petitioner to New Orleans. As sent over the wires of the company from Greenville to New Orleans, the message read as follows:

> "Ft. Deposit, Ala. 12-16-1919. J. K. Lewis, 411 Poydras Street, New Orleans, La. Offer you one thousand or fifteen hundred pounds Frotchers pecans at *50c* f. o. b. Ft. Deposit. Answer. C. H. Priester."

The message was correctly transmitted to the main office of petitioner at New Orleans but in relaying it between branch offices maintained by the company to expedite business in the downtown section of New Orleans, it was altered to read:

> "J. K. Lewis, N. O. La. Offer you 1000 or 1500 pounds Frothiers at *15 cents* f. o. b. Deposit. Answer. C. H. Priester."

Upon receipt of the message by Lewis, he telegraphed respondent, Priester, that he would take 1500 pounds of pecans offered and in reliance upon such message, respondent Priester shipped to Lewis 1006 pounds of pecans and received pay therefor at the rate of 15c per pound instead of 50c per pound as originally offered by him.

On July 21, 1920, respondent Priester filed suit for damages against petitioner in the circuit court of Butler County, Alabama, the complaint consisting of a single count alleging negligence in the transmission of the telegram. There were three trials of the suit in the circuit court of Butler County, and the pleadings were several times amended. For the purposes of this petition it will suffice to say that the trial as finally had was upon two counts alleging *gross* negligence on the part of the defendant's agents or employees in and about the transmission and delivery of the message and special pleas setting up two separate Federal defenses: (1) The interstate nature of the message; that it was sent as an unrepeated message and under the company's rules, regulations and tariffs on file with the Interstate Commerce Commission the damages were limited to the amount paid for sending the message; (2) that the message was an interstate message and that under the company's rules, regulations and tariffs on file with the Interstate Commerce Commission at the time of sending the message the company's liability was limited to $50.00, at which the said message had been valued by the sender. The Federal defenses were raised at every stage of the proceedings, including pleas to the original and amended complaints, rulings on pleadings, on the admission of evidence, requested charges and motion for a new trial.

On the last trial the circuit court of Butler County submitted the case to the jury solely on the issue of gross negligence on the part of the petitioner's servants or agents in

and about the transmission of the message and charged the jury that if under the evidence the jury should find that the agents of the defendant "did not bestow the care and skill which the situation demanded they should bestow", the plaintiff could recover. The jury returned a verdict for respondent Priester for $514.07 and judgment was entered accordingly. After the trial court had overruled a motion for a new trial, which again raised the Federal defenses, an appeal was taken to the Court of Appeals of Alabama, which court has final jurisdiction of suits at law where the amount involved does not exceed $1,000.00. (Code Alabama 1923, Sec. 7309). The Court of Appeals of Alabama on the 26th day of October, 1926, affirmed the judgment of the circuit court of Butler County. Whereupon petitioner on the 4th day of November, 1926, filed an application in said Court of Appeals of Alabama for a rehearing, which said petition for a rehearing was denied on the 9th day of November, 1926. Thereupon, petitioner on the 22nd day of November, 1926, filed in the Supreme Court of Alabama, which court under Sec. 140 of the Constitution of Alabama has supervisory power over the Court of Appeals, a petition in strict accordance with rule 44 of the said Supreme Court (Code of Alabama, 1923, Volume IV, p. 894) for a writ of certiorari to the Court of Appeals to review and determine the decision rendered by the Court of Appeals in said cause on the 26th day of October, 1926, and in support of said petition for certiorari in the Supreme Court, did file a brief and argument as required by the rules of said court; and on the 13th day of January, 1927, the Supreme Court of Alabama entered an order denying said petition for certiorari.

The reasons relied on for the allowance of the writ of certiorari from the Supreme Court of the United States to the Supreme Court of Alabama are as follows:

1st. The Supreme Court of Alabama erred in not granting a writ of certiorari to the Court of Appeals of Alabama directing said Court to reverse the said judgment of the Circuit Court of Butler County, Ala., as by such action it expressed its approval of the decision of said Court of Appeals of Alabama in affirming a judgment against petitioner for more than $50.00, based on *gross* negligence on the part of petitioner's agents on account of an error made in the transmission of an interstate telegraphic message not specially valued by the sender, where liability for such default was specially limited to the sum of $50.00 by the company's tariffs and classifications on file with the Interstate Commerce Commission; such decision of the Court of Appeals being in conflict with the decision of this Court in the case of *Western Union Telegraph Company v. Czizek*, 264 U. S. 281.

2nd. The Supreme Court of Alabama erred in not granting a writ of certiorari to the Court of Appeals of Alabama directing said Court to reverse the said judgment of the Circuit Court of Butler County, Ala., as by such action it expressed its approval of the decision of said Court of Appeals of Alabama in affirming a judgment against petitioner for more than the toll paid, based on *gross* negligence on the part of petitioners' agents on account of an error made in the transmission of an unrepeated interstate telegraphic message, where liability for such default was limited to the toll paid by the company's tariffs and classifications on file with the Interstate Commerce Commission; such decision of the Court of Appeals of Alabama being probably not in accord with applicable decisions of this Court.

Your petitioner believes that the aforesaid judgment of the Supreme Court of Alabama is erroneous and that this Honorable Court should require the said case to be certified

to it for its review and determination in conformity with the provisions of the Act of Congress and the rules of this Honorable Court in such cases made and provided.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Supreme Court of Alabama, commanding the said Court to certify and send to this Court on a day certain to be designated therein, a full and complete transcript of the record and all proceedings of the said Supreme Court of Alabama in said case therein entitled *Ex parte Western Union Telegraph Co. In re: Western Union Telegraph Company, Appellant, v. C. H. Priester, Appellee,* 3rd Division, No. 783, to the end that the said case may be reviewed and determined by this Court as provided in Judicial Code, Sec. 337 (b) as amended by the Act of February 13, 1925; or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said Act, and that the said judgment of the said Supreme Court of Alabama in said case and every part thereof may be reversed by this Honorable Court and your petitioner will ever pray.

FRANCIS R. STARK,

RAY RUSHTON,
Attorneys for Petitioner.

STATE OF ALABAMA,
MONTGOMERY COUNTY.

Ray Rushton, being duly sworn, deposes and says that he is one of the attorneys for the petitioner in the foregoing petition and has read the same; that he is duly authorized to make this affidavit on behalf of said petitioner; that the same is true to his own knowledge, information and belief, that his knowledge is derived from the record in the case and from what has taken place in his presence and hearing in the courts in which said action has been heard.

RAY RUSHTON.

Sworn to and subscribed before me this the..... day of March, 1927.

.....
Notary Public.

My commission expires.....day of....., 19.....

I HEREBY CERTIFY that I have examined the foregoing petition and in my opinion the petition is well founded and that the case is one in which the prayer of the petitioner should be granted by this Court.

RAY RUSHTON,
Of Counsel for Petitioner.

WESTERN UNION TELEGRAPH COMPANY,
Petitioner,

v.

C. H. PRIESTER,
Respondent.

IN THE SUPREME COURT OF THE UNITED STATES.

The Clerk will enter our appearance as counsel for the petitioner.

FRANCIS R. STARK,

RAY RUSHTON.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1926-27.

WESTERN UNION TELEGRAPH COMPANY,
Petitioner

v.

C. H. PRIESTER,
Respondent.

BRIEF OF PETITIONER ON PETITION FOR CERTIORARI TO THE COURT OF APPEALS OF ALABAMA.

Official Reports of Opinions Delivered in the Courts Below:

Western Union Telegraph Company v. Priester, 18 Ala. App. 531; 93 So. 231.
Priester v. Western Union Telegraph Company, 20 Ala. App. 388; 102 So. 372.
Ex parte Priester, 212 Ala. 271; 102 So. 376.
Western Union Telegraph Company v. Priester, (Not Reported, R. 124).

GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED:

1. To review a judgment of the Court of Appeals of Alabama (R. 129), the highest court of the state in which a decision could be had, of October 26, 1926 (said judgment

becoming final on January 13, 1927, upon denial by the Supreme Court of Alabama of writ of certiorari to the Court of Appeals, R. 148), affirming a judgment of the circuit court of Butler County, Alabama, in favor of respondent, Priester, on a complaint charging *gross* negligence in the transmission of an interstate telegram sent as a not specially valued and as an unrepeated message, where petitioner separately denied liability under its tariffs on file with the Interstate Commerce Commission of more than (A) $50.00, the amount at which the message had been valued by the sender, and (B) the toll paid, under its unrepeated message classification limiting liability to such amount.

2. A. Petitioner claimed in the circuit court of Butler County, Alabama, in the Court of Appeals of Alabama and, upon petition for certiorari to the Court of Appeals, in the Supreme Court of Alabama, that since the Amendment to the Interstate Commerce Act of June 18, 1910 (36 Stat. L. 539), under its tariffs and classifications on file with the Interstate Commerce Commission, its liability for default in the transmission of an interstate telegraphic message not specially valued was limited to $50.00 and this liability was not affected by the degree of negligence on the part of its agents. This claim was denied by said Courts of Alabama and a recovery of more than $50.00 permitted on a complaint charging *gross* negligence. (R. 20, 27, 35, 42, 44, 45, 47, 119, 121, 125, 129, 136, 147).

B. Petitioner claimed in the circuit court of Butler County, Alabama, in the Court of Appeals of Alabama and, upon petition for certiorari to the Court of Appeals, in the Supreme Court of Alabama, that since the Amendment to the Interstate Commerce Act of June 18, 1910 (36 Stat. L. 539), under its tariffs and classifications on file with the Interstate Commerce Commission, its liability on account

of an error made in the transmission of an unrepeated interstate telegraphic message was limited to the amount paid for sending the message and that this liability was not affected by the degree of negligence on the part of its agents. This claim was denied by said courts of Alabama and a recovery of more than the toll paid permitted on a complaint charging *gross* negligence. (R. 20, 25, 35, 39, 41, 44, 45, 47, 119, 121, 125, 129, 136, 137.)

3. Jurisdiction is invoked under section 237 (b), as amended by the Act of February 13, 1925, of the United States Judicial Code.

4. Cases believed to sustain the jurisdiction:

Postal Telegraph-Cable Co. v. Warren-Godwin Lbr. Co. 251 U. S. 27

Western Union Telegraph Co. v. Esteve Brothers, 256 U. S. 566

Western Union Telegraph Company v. Czizek, 264 U. S. 281.

STATEMENT OF THE CASE

An error was made by petitioner's agents in the transmission of a telegram from Ft. Deposit, Alabama, to New Orleans, La., by changing "fifty" to "fifteen" in an offer to sell pecans, by reason of which error respondent suffered a pecuniary loss of $352.10. (R. 150, 151, 152). Respondent in his action for damages against petitioner in the circuit court of Butler County, Alabama, charged that the error was the result of *gross* negligence on the part of petitioner's agents. (R. 3, 20, 21.) Petitioner by pleas, introduction of testimony, requested written charges and motion for new trial, interposed two Federal defenses: (1) That the message was not sent as a specially valued message and

under the Company's tariffs and classifications on file with the Interstate Commerce Commission, its liability was limited to $50.00; (2) that the message was an unrepeated message and under the Company's tariffs and classifications on file with the Interstate Commerce Commission liability for error in an unrepeated interstate message was limited to the toll paid. (R. 25, 39, 45, 47, 79, 96, 97, 112, 113, 119).

The Federal defenses set up by petitioner were denied application to an action charging *gross* negligence by the trial court. (.R 44, 45, 46, 47, 114, 121.) The trial court charged the jury:

"The question you are to determine is, whether or not under the conditions and circumstances under which this message was delivered and transmitted, the defendant through its agents and servants, did *bestow the care and skill* which the situation demanded they *should* bestow. If they did and there was a mistake in the transmission of the message the plaintiff could not recover, but if they did *not* the plaintiff would be entitled to recover the damages which the testimony, after you have considered it all, shows the plaintiff suffered by reason of the error or mistake of the defendant. That is all there is in the case." (R. 111.) Petitioner duly excepted to the foregoing portion of the court's oral charge, which exception was allowed by the court. (R. 112, 113).

All of the rulings of the trial court denying petitioner the benefit of the Federal defenses as against a complaint alleging *gross* negligence were duly assigned as error in the Court of Appeals of Alabama. (R. 124-127). None of the assignments of error were held good by the Court of Appeals of Alabama, which court has final jurisdiction of suits at law where the amount involved does not exceed $1000.00 (Code of Alabama 1923, Sec. 7309), and on Oct-

ober 26, 1926, said court affirmed the judgment of the circuit court of Butler County, Alabama. (R. 129). Whereupon, petitioner on November 4, 1926, duly filed its application for rehearing in said Court of Appeals supported by brief, (R. 130-134), which application was overruled on November 9, 1926. (R. 134). On November 22, 1926, (R. 147) petitioner filed with the Supreme Court of Alabama, which court has supervisory power over the Court of Appeals under Sec. 140 of the Constitution of Alabama, a petition for certiorari to the Court of Appeals (R. 136) which petition was denied by the Supreme Court of Alabama on January 13, 1927 (R. 148).

ARGUMENT

In a series of well considered cases this Court has definitely determined and settled the following propositions relating to the duties and liabilities of telegraph companies with respect to their interstate business, since the amendment to the Interstate Commerce Act of June 18, 1910:

1. That such companies are subject to the rule of equality of rates and uniformity of obligation which it was the purpose of the Interstate Commerce Act to establish. (*Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co.*, 251 U. S. 27, 1919; *Western Union Telegraph Company v. Boegli*, 251 U. S. 315, 1920).

2. That without assent in fact the sender is bound as a matter of law by a provision in the company's lawfully established tariffs limiting liability for mistake in the transmission of unrepeated messages to the amount of the toll paid, where the tariff offers alternative rates for repeated and unrepeated messages; that the rate is law-fixed and the liability law-imposed and neither can be departed

from by the parties. (*Western Union Telegraph Company v. Esteve Brother*, 256 U. S. 566, 1921).

3. That a provision in the company's message tariffs limiting liability to $50.00 unless the message is specially valued is valid and is a good defense in an action where there had been a complete failure to transmit the message from the office of origin and in addition the company had mistakenly informed the sender when he inquired, that the message had been duly sent; that even where *gross* negligence on the part of the company's agents was claimed and proven to the satisfaction of the lower court, in the case of a valued message the addition of a *"vituperative epithet"* to the admitted fault would not authorize a recovery beyond the amount at which the message had been valued.— (*Western Union Telegraph Company v. Czizek*, 264 U. S. 281, 1924).

The Alabama courts recognize the binding effect of the foregoing decisions of this Court but they have reached the erroneous conclusion that these decisions have not affected the application to cases arising since the amendment of June 18, 1910, of the principle of law supposed to have been approved by this Court in the case of *Primrose v. Western Union Telegraph Company*, 154 U. S. 1, (1894), that a contract limiting liability for default in the transmission and delivery of a telegraphic message is void where such default was caused by *"gross"* negligence on the part of the telegraph company's agents.— (*Western Union Telegraph Company v. Priester*, 18 Ala. App. 531; *Ex parte Priester*, 212 Ala. 271.) In response to an application by respondent for a writ of certiorari to the Court of Appeals on the second appeal in this case, the Supreme Court of Alabama stated that since the amendment of 1910, "rights and liabilities arising out of interstate messages depend upon acts of Congress, the contract between the parties, and common

law principles as declared and enforced by the Federal courts", and further stated that under Federal decisions "the failure to exercise that degree of care which the situation—its regulation included—demanded, was gross negligence against which it (petitioner) could not contract." —(212 Ala. p. 273).

This opinion of the Supreme Court was binding upon the Court of Appeals on the third appeal and is the error which permeates the subsequent proceedings in the case. The above definition of *"gross"* negligence given by the Supreme Court of Alabama and followed by the trial court in its charge to the jury is nothing more than the commonly accepted definition of *simple* negligence.

Under the decisions of this Court cited above, since the amendment of June 18, 1910, the rights and liabilities of parties arising out of interstate messages do not depend upon either "the contract between the parties" or "common law principles as declared and enforced by the Federal courts." Such rights and liabilities depend entirely upon the legally established tariffs, rules, regulations and classifications of telegraph companies engaged in interstate business. The Primrose case arose under common law principles which principles no longer apply. The misconception of the effect of the Primrose case on the part of the Supreme Court of Alabama was caused, in part at least, by the fact that this Court in the Warren-Godwin Lumber Company case and the Czizek case cited the Primrose case, and the Alabama court overlooked the fact that such citations were not to the point that gross negligence has any effect on the present liability of telegraph companies. It is respectfully urged, therefore, that this Court should in unmistakable terms announce that, whatever the degree of negligence, so long as it does not amount to wilful or inten-

tional conduct, the rule of uniformity required by the Interstate Commerce Commission Act obtains.

If the decisions of the Court of Appeals and of the Supreme Court of Alabama in this case are to be permitted by this Court to stand, the decisions of this Court cited above are in practical effect nullified. The whole object of the Interstate Commerce Act is to secure equality and uniformity of rate and obligation, and to permit the various state courts to apply their different and probably conflicting ideas and definitions as to what constitutes *"gross"* negligence would put the law pertaining to the duties and obligations of interstate telegraph companies back to where it was before the amendment of June 18, 1910.

Respectfully submitted,

FRANCIS R. STARK,

RAY RUSHTON,
Attorneys for Petitioner.

RUSHTON, CRENSHAW & RUSHTON,
of Montgomery, Alabama,
Of Counsel.

Office Supreme Court, U. S.
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No. [redacted] 189

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1926-27.

WESTERN UNION TELEGRAPH COMPANY,
Petitioner

v.

C. H. PRIESTER,
Respondent.

BRIEF OF PETITIONER ON PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA.

BROWN PRINTING CO. MONTGOMERY, 1927

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1926-27.

WESTERN UNION TELEGRAPH COMPANY,
Petitioner
v.
C. H. PRIESTER,
Respondent.

BRIEF OF PETITIONER ON PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA.

Official Reports of Opinions Delivered in the Courts Below:

Western Union Telegraph Company v. Priester, 18 Ala. App. 531; 93 So. 231.
Priester v. Western Union Telegraph Company, 20 Ala. App. 388; 102 So. 372.
Ex parte Priester, 212 Ala. 271; 102 So. 376.
(Not Reported, R. 124).
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GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED:

(1) To review a judgment of the Supreme Court of the State of Alabama (R. 148), the highest court of the State, of January 13, 1927, denying the petition of petitioner for a writ of certiorari directed to the Court of Appeals of Alabama (R. 136-146) to review and determine the decision of said Court of Appeals of Alabama rendered on the 26th day of October, 1926 (R. 135), affirming a judgment of the

circuit court of Butler County, Alabama, in favor of respondent, Priester, on a complaint charging *gross* negligence in the transmission of an interstate telegram sent as a not specially valued and as an unrepeated message, where petitioner separately denied liability under its tariffs on file with the Interstate Commerce Commission of more than (A) $50.00, the amount at which the message had been valued by the sender, and (B) the toll paid, under its unrepeated message classification limiting liability to such amount.

2. A. Petitioner claimed in the circuit court of Butler County, Alabama, in the Court of Appeals of Alabama and, upon petition for certiorari to the Court of Appeals, in the Supreme Court of Alabama, that since the Amendment to the Interstate Commerce Act of June 18, 1910 (36 Stat. L. 539), under its tariffs and classifications on file with the Interstate Commerce Commission, its liability for default in the transmission of an interstate telegraphic message not specially valued was limited to $50.00 and this liability was not affected by the degree of negligence on the part of its agents. This claim was denied by said Courts of Alabama and a recovery of more than $50.00 permitted on a complaint charging *gross* negligence. (R. 20, 27, 35, 42, 44, 45, 47, 119, 121, 125, 129, 136, 147).

B. Petitioner claimed in the circuit court of Butler County, Alabama, in the Court of Appeals of Alabama and, upon petition for certiorari to the Court of Appeals, in the Supreme Court of Alabama, that since the Amendment to the Interstate Commerce Act of June 18, 1910 (36 Stat. L. 539), under its tariffs and classifications on file with the Interstate Commerce Commission, its liability on account of an error made in the transmission of an unrepeated interstate telegraphic message was limited to the amount paid for sending the message and that this liability was not

affected by the degree of negligence on the part of its agents. This claim was denied by said courts of Alabama and a recovery of more than the toll paid permitted on a complaint charging *gross* negligence. (R. 20, 25, 35, 39, 41, 44, 45, 47, 119, 121, 125, 129, 136, 147.)

3. Jurisdiction is invoked under section 237 (b), as amended by the Act of February 13, 1925, of the United States Judicial Code.

4. Cases believed to sustain the jurisdiction:

Postal Telegraph-Cable Co. v. Warren-Godwin Lbr. Co. 251 U. S. 27.

Western Union Telegraph Co. v. Esteve Brothers, 256 U. S. 566

Western Union Telegraph Company v. Czizek, 264 U. S. 281.

STATEMENT OF THE CASE

An error was made by petitioner's agents in the transmission of a telegram from Ft. Deposit, Alabama, to New Orleans, La., by changing "fifty" to "fifteen" in an offer to sell pecans, by reason of which error respondent suffered a pecuniary loss of $352.10. (R. 150, 151, 152). Respondent in his action for damages against petitioner in the circuit court of Butler County, Alabama, charged that the error was the result of *gross* negligence on the part of petitioner's agents. (R. 3, 20, 21.) Petitioner by pleas, introduction of testimony, requested written charges and motion for new trial, interposed two Federal defenses: (1) That the message was not sent as a specially valued message and under the Company's tariffs and classifications on file with the Interstate Commerce Commission, its liability was limited to $50.00; (2) that the message was an unrepeated

message and under the Company's tariffs and classifications on file with the Interstate Commerce Commission liability for error in an unrepeated interstate message was limited to the toll paid. (R. 25, 39, 45, 47, 79, 966, 97, 112, 113, 119).

The Federal defenses set up by petitioner were denied application to an action charging *gross* negligence by the trial court. (R. 44, 45, 46, 47, 114, 121.) The trial court charged the jury:

"The question you are to determine is, whether or not under the conditions and circumstances under which this message was delivered and transmitted, the defendant through its agents and servants, did *bestow the care and skill* which the situation demanded they *should* bestow. If they did and there was a mistake in the transmission of the message the plaintiff could not recover, but if they did *not* the plaintiff would be entitled to recover the damages which the testimony, after you have considered it all, shows the plaintiff suffered by reason of the error or mistake of the defendant. That is all there is in the case." (R. 111.) Petitioner duly excepted to the foregoing portion of the court's oral charge, which exception was allowed by the court. (R. 112, 113).

All of the rulings of the trial court denying petitioner the benefit of the Federal defenses as against a complaint alleging *gross* negligence were duly assigned as error in the Court of Appeals of Alabama. (R. 124-127). None of the assignments of error were held good by the Court of Appeals of Alabama, which court has final jurisdiction of suits at law where the amount involved does not exceed $1000.00 (Code of Alabama 1923, Sec. 7309), and on October 26, 1926, said court affirmed the judgment of the circuit court of Butler County, Alabama. (R. 129). Where-

upon, petitioner on November 4, 1926, duly filed its application for rehearing in said Court of Appeals supported by brief (R. 130-134), which application was overruled on November 9, 1926. (R. 134). On November 22, 1926 (R. 147), petitioner filed with the Supreme Court of Alabama, which court has supervisory power over the Court of Appeals under Sec. 140 of the Constitution of Alabama, a petition for certiorari to the Court of Appeals (R. 136) which petition was denied by the Supreme Court of Alabama on January 13, 1927 (R. 148).

ARGUMENT

In a series of well considered cases this Court has definitely determined and settled the following propositions relating to the duties and liabilities of telegraph companies with respect to their interstate business, since the amendment to the Interstate Commerce Act of June 18, 1910:

1. That such companies are subject to the rule of equality of rates and uniformity of obligation which it was the purpose of the Interstate Commerce Act to establish. (*Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co.*, 251 U. S. 27, 1919; *Western Union Telegraph Company v. Boegli*, 251 U. S. 315, 1920).

2. That without assent in fact the sender is bound as a matter of law by a provision in the company's lawfully established tariffs limiting liability for mistake in the transmission of unrepeated messages to the amount of the toll paid, where the tariff offers alternative rates for repeated and unrepeated messages; that the rate is law-fixed and the liability law-imposed and neither can be departed from by the parties. (*Western Union Telegraph Company v. Esteve Brothers*, 256 U. S. 566, 1921).

3. That a provision in the company's message tariffs limiting liability to $50.00 unless the message is specially valued is valid and is a good defense in an action where there had been a complete failure to transmit the message from the office of origin and in addition the company had mistakenly informed the sender when he inquired, that the message had been duly sent; that even where *gross* negligence on the part of the company's agents was claimed and proven to the satisfaction of the lower court, in the case of a valued message the addition of a *"vituperative epithet"* to the admitted fault would not authorize a recovery beyond the amount at which the message had been valued.—(*Western Union Telegraph Company v. Czizek*, 264 U. S. 281, 1924).

The Alabama courts recognize the binding effect of the foregoing decisions of this Court but they have reached the erroneous conclusion that these decisions have not affected the application to cases arising since the amendment of June 18, 1910, of the principle of law supposed to have been approved by this Court in the case of *Primrose v. Western Union Telegraph Company*, 154 U. S. 1 (1894), that a contract limiting liability for default in the transmission and delivery of a telegraphic message is void where such default was caused by *"gross"* negligence on the part of the telegraph company's agents.—(*Western Union Telegraph Company v. Priester*, 18 Ala. App. 531; *Ex parte Priester*, 212 Ala. 271.) In response to an application by respondent for a writ of certiorari to the Court of Appeals on the second appeal in this case, the Supreme Court of Alabama stated that since the amendment of 1910, "rights and liabilities arising out of interstate messages depend upon acts of Congress, the contract between the parties, and common law principles as declared and enforced by the Federal courts", and further stated that under Federal decisions "the failure to exercise that degree of care which the sit-

uation—its regulation included—demanded, was gross negligence against which it (petitioner) could not contract." —(212 Ala. p. 273).

This opinion of the Supreme Court was binding upon the Court of Appeals on the third appeal and is the error which permeates the subsequent proceedings in the case. By denying the petition of petitioner for a writ of certiorari to the Court of Appeals on the last appeal, the Supreme Court adhered to and reaffirmed its ideas of the principles of law applicable to an error made in the transmission of an interstate telegraph message. The above definition of *"gross"* negligence given by the Supreme Court of Alabama and followed by the trial court in its charge to the jury is nothing more than the commonly accepted definition of *simple* negligence.

Under the decisions of this Court cited above, since the amendment of June 18, 1910, the rights and liabilities of parties arising out of interstate messages do not depend upon either "the contract between the parties" or "common law principles as declared and enforced by the Federal courts." Such rights and liabilities depend entirely upon the legally established tariffs, rules, regulations and classifications of telegraph companies engaged in interstate business. The Primrose case arose under common law principles which principles no longer apply. The misconception of the effect of the Primrose case on the part of the Supreme Court of Alabama was caused, in part at least, by the fact that this Court in the Warren-Godwin Lumber Company case and the Czizek case cited the Primrose case, and the Alabama court overlooked the fact that such citations were not to the point that gross negligence has any effect on the present liability of telegraph companies. It is respectfully urged, therefore, that this Court should in unmistakable terms announce that, whatever the degree of

negligence, so long as it does not amount to wilful or intentional conduct, the rule of uniformity required by the Interstate Commerce Commission Act obtains.

If the decisions of the Court of Appeals and of the Supreme Court of Alabama in this case are to be permitted by this Court to stand, the decisions of this Court cited above are in practical effect nullified. The whole object of the Interstate Commerce Act is to secure equality and uniformity of rate and obligation, and to permit the various state courts to apply their different and probably conflicting ideas and definitions as to what constitutes "*gross*" negligence would put the law pertaining to the duties and obligations of interstate telegraph companies back to where it was before the amendment of June 18, 1910.

Respectfully submitted,

FRANCIS R. STARK,

RAY RUSHTON,
Attorneys for Petitioner.

RUSHTON, CRENSHAW & RUSHTON,
of Montgomery, Alabama,
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1927.
No. 916.

WESTERN UNION TELEGRAPH COMPANY,
Petitioner

vs.

C. H. PRIESTER.

On Writ of Certiorari to the Court of Appeals of the State of Alabama. Petition for Certiorari filed February 21, 1927. Certiorari granted April 18, 1927.

No. 958.

WESTERN UNION TELEGRAPH COMPANY,
Petitioner

vs.

C. H. PRIESTER.

On Writ of Certiorari to the Supreme Court of the State of Alabama. Petition for Certiorari filed March 7, 1927. Certiorari granted April 18, 1927.

BRIEF OF FRANCIS R. STARK AND RAY RUSHTON FOR PETITIONER

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(b) Official Reports of Opinions delivered in the courts below:

Western Union Telegraph Company vs. Priester, 18 Ala. App. 531; 93 So. 231.
Priester vs. Western Union Telegraph Company, 20 Ala. App. 388; 102 So. 372.
Ex Parte Priester, 212 Ala. 271; 102 So. 376.
Western Union Telegraph Company vs. Priester, 21 Ala. App. 587, 111 So. 199.
Western Union Telegraph Company vs. C. H. Priester, 215 Ala. 435, 111 So. 200.

(c) *Grounds on which the jurisdiction of the Court is invoked*:

While counsel for petitioner are reasonably satisfied that the writ of ceritiorari should run from this Court to the Court of Appeals of Alabama, (*Norfolk & Suburban Turnpike Co. v. Virginia,* 225 U. S. 264; *Western Union Telegraph Company v. Crovo,* 220 U. S. 364), nevertheless, because of some uncertainties which still remain in view of what was said in *Matthews v. Huwe,* 269 U. S. 262 (70 L. Ed. 266), we thought it not improper, out of abundant caution, to ask for a writ directed also to the Supreme Court of the State of Alabama. Both petitions were granted by this Court on April 18, 1927 (R. 149), and while docketed separately as No. 916 and No. 958, we are informed by the Clerk that they will be heard as one case and that no motion to consolidate under Clause 8 of Rule 18 is necessary.

The petition in No. 916 is to review the judgment dated Tuesday, October 26, 1926 (R. 129), of the Court of Appeals of the State of Alabama, the highest court of the State in which a decision could be had, said judgment becoming final on January 13, 1927, upon denial by the Supreme

Court of Alabama of writ of certiorari to the Court of Appeals (R. 148), affirming a judgment of the circuit court of Butler County, Alabama, in favor of respondent, Priester, on two counts in a complaint charging *gross* negligence in the transmission of an interstate telegram sent as an unrepeated and not specially valued message; where petitioner separately denied liability under its tariffs on file with the Interstate Commerce Commission for more than (a) the toll paid, under its unrepeated message classification limiting liability to such amount, and (b) $50.00, the amount at which the message had been valued by the sender. The petition in No. 958 is to review a judgment of the Supreme Court of the State of Alabama, the highest court of the State, dated Thursday, January 13, 1927 (R. 148), denying the petition of petitioner for a writ of certiorari directed to the Court of Appeals of Alabama (R. 136-146) to review the said decision of said Court of Appeals of Alabama.

2-A. Petitioner claimed in the Circuit Court of Butler County, Alabama, in the Court of Appeals of Alabama and, upon petition for certiorari to the Court of Appeals, in the Supreme Court of Alabama, that since the Amendment to the Interstate Commerce Act of June 18, 1910 (36 Stat. L. 539), under its tariffs and classifications on file with the Interstate Commerce Commission its liability on account of an error made in the transmission of an unrepeated interstate telegraphic message was limited to the amount paid for sending the message and that this liability was not affected by the degree of negligence on the part of its agents. This claim was denied by said courts of Alabama and a recovery of more than the toll permitted on a complaint charging *gross* negligence (R. 20, 25, 35, 39, 41, 44, 45, 119, 121, 125, 136, 147).

2-B. Petitioner claimed in the Circuit Court of Butler County, Alabama, in the Court of Appeals of Alabama and, upon petition for certiorari to the Court of Appeals, in the Su-

preme Court of Alabama, that since the Amendment to the Interstate Commerce Act of June 18, 1910 (36 Stat. L. 539), under its tariffs and classifications on file with the Interstate Commerce Commission, its liability for default in the transmission of an interstate telegraphic message valued by the sender at $50.00 was not affected by the degree of negligence on the part of its agents. This claim was denied by said courts of Alabama and a recovery of more than $50.00 permitted on a complaint charging *gross* negligence. (R. 26, 27, 35, 42, 44, 45, 47, 119, 121, 125, 129, 136, 147.)

3. Jurisdiction is invoked under Section 237 (b) as amended by the Act of February 13, 1925, of the United States Judicial Code.

4. Cases believed to sustain the jurisdiction:

Postal Telegraph-Cable Co. vs. Warren-Godwin Lumber Co., 251 U. S. 27.

Western Union Tel. Co. v. Southwick, 255 *U. S.* 565.

Western Union Tel. Co. v. Czizek, 264 U. S. 281.

STATEMENT OF THE CASE.

An error was made by petitioner's agents in the transmission of a telegram from respondent Priester at Fort Deposit, Alabama, to one J. K. Lewis at New Orleans, La., dated December 16, 1919, by changing "fifty" to "fifteen", in an offer to sell pecans, by reason of which error respondent suffered a pecuniary loss of $352.10. (R. 150, 151, 152.) Respondent in his amended complaint on which the last trial was had in the Circuit Court of Butler County, Alabama, charged that the error was the result of *gross* negligence on the part of petitioner's agents (R. 3, 20, 21). Petitioner by pleas, introduction of testimony, requested written charges and motion for new trial, interposed two Federal defenses: (1) That the message was an unrepeated message and under the Company's tariffs and classifications on file with the Interstate Commerce Commission liability for error in an unrepeated interstate message was limited to the toll paid. (R. 25, 39, 45, 47, 79, 96, 97, 112, 113, 119.) (2) That the message was not sent as a specially valued message and under the Company's tariffs and classifications on file with the Interstate Commerce Commission, its liability was limited to $50.00.

The Federal defenses set up by petitioner were denied application to an action charging *gross* negligence by the trial court. (R. 44, 45, 46, 47, 114, 121.)

The message on which the suit was based was delivered to the Telegraph Company over the telephone. (R. 49.) The case was tried three times in the Circuit Court of Butler County, Alabama. The original complaint consisted of one count setting up that the alteration or change in the message in transmission from the word "fifty" to "fifteen", "was done through the negligence of defendant's servants, and agents", etc. (R. 3-4.) To this complaint the Telegraph Company pleaded the general issue and a special defense that the message was an interstate message and that under the Company's

rules, regulations and tariffs on file with the Interstate Commerce Commission the Company's liability for the mistake was limited to the toll paid. (R. 5-12.) The trial court overruled this defense to a case where the message was delivered to the Company over the telephone and plaintiff obtained a judgment for the full amount of his claim, from which judgment the Telegraph Company duly appealed to the Court of Appeals of Alabama, which Court, on the authority of *Western Union Telegraph Company v. Esteve Brothers*, 256 U. S. 566, reversed the judgment of the Circuit Court of Butler County, Alabama, and remanded the cause (*Western Union Telegraph Company v. Priester*, 18 Ala. App. 531; 93 So. 231). The Court of Appeals of Alabama said that "in the absence of an averment in the complaint charging wilful misconduct or gross negligence * * * * * the sender of an unrepeated message from one State to another is charged with the knowledge of the rules governing the sending of such messages and without actual knowledge is legally bound by the provision in the company's lawfully established tariff and also bound to the limits named in such tariff as to the company's liability for mistake in transmission of unrepeated messages to the amount of the tolls collected on the message sent where such tariff offers alternative rates for repeated and unrepeated messages," etc. (18 Ala. App. 531.)

After the reversal of the case, the plaintiff, evidently acting on the suggestion contained in the opinion of the Court of Appeals, amended his complaint on September 27, 1922, by adding counts 2, 3 and 4 (R. 16-17) and at a still later date further amended his complaint by adding counts 5, 6 and 7 (R. 20-21), setting up in count 5 that the negligence and misconduct of defendant's agent "was willfully brought about and willfully done", and, in counts 6 and 7, that the negligence was "gross". To these counts the defendant demurred and the court (R. 24) sustained demurrers to counts 2, 3 and 4, but overruled demurrers to counts 5, 6 and 7. Whereupon, the defendant Telegraph Company re-filed its former pleas and an

additional plea 6 (R. 22). The plaintiff demurred to each of these pleas and the court (R. 24) sustained demurrers to pleas 3, 4, 5 and 6 as to counts 5, 6 and 7 of the complaint but overruled the demurrers to said pleas in so far as they were an answer to count one of the complaint. The result of the second trial of the case in the Circuit Court was a verdict for the plaintiff for the nominal sum of one dollar. From this judgment the plaintiff Priester took an appeal to the Court of Appeals of Alabama, and the Court of Appeals affirmed said judgment (*Priester v. Western Union Telegraph Company*, 20 Ala. App. 388; 102 So. 372). Whereupon, the plaintiff applied to the Supreme Court of Alabama for a writ of certiorari and succeeded in getting that Court to grant the writ of certiorari (*Ex parte Priester*, 212 Ala. 271; 102 So. 376). In accordance with the opinion of the Supreme Court, the Court of Appeals of Alabama reversed and remanded the cause to the circuit court of Butler County in a per curiam opinion (102 So. 376). The case came up for the third trial in the circuit court of Butler County. The defendant substituted for its former special pleas, pleas 2, 3, 4, and 5, setting up both the unrepeated message stipulation and the fifty dollar valuation stipulation and as to each, in four and five, set up estoppel (R. 25-33). The plaintiff demurred to these pleas (R. 33-34), and the court (R. 44-45) sustained demurrers to said pleas in so far as they purported to answer counts 5, 6 and 7 of the complaint. Upon the issue thus joined, the trial was entered into and there was a bill of exceptions (R. 48-121). After the Judge of the Circuit Court of Butler County had proceeded to some extent with his oral charge to the jury, Mr. Powell, plaintiff's attorney, arose and said (R. 110):

> "In order to get the matter simplified, we withdraw the first count of the complaint and rely on the last two counts of the complaint and let remain as far as applicable the last two counts."

Said Circuit Court then proceeded with its oral charge as follows:

> The Court: "So it becomes a question for you to say whether or not the defendant's servants or agents in the transmission of the telegram was guilty of gross negligence in and about its transmission as alleged in the complaint. If it was, the plaintiff would be entitled to recover. If it was not, the plaintiff would not be entitled to recover. That is all there is in the case."

The Court in continuance of its oral charge also said (R. 111):

> "The Supreme Court in defining negligence, says: 'Negligence is a failure to bestow the care and skill which the situation demands'. In other words, it was the duty of the defendant in the transmission of this telegram to handle it with care and with the skill the situation demanded; it was the duty of the defendant to provide itself and its servants and agents with proper instruments for the transmission of the message and with skillful operators for the operation of these instruments. So that the question you are to determine is whether or not under the conditions and circumstances under which this message was delivered and transmitted the defendant through its agents and servants did bestow the care and skill which the situation demanded they should bestow. If they did and there was a mistake in the transmission of the message, the plaintiff could not recover but if they did not, the plaintiff would be entitled to recover the damages which the testimony, after you have considered it all, shows the plaintiff suffered by reason of the error or mistake of the defendant. That is all there is in the case."

The defendant Telegraph Company, before the jury retired, excepted to the above quoted part of the Judge's oral charge (R. 112) and also requested the court in writing to give charges numbered 3, 4, 6, 7, 8, 9, 10, 11, 12, 13 and 14, separately and severally, charging the jury in various ways that

under the Company's regulations on file with the Interstate Commerce Commission, plaintiff could only recover the toll paid with interest, all of which said requested charges were refused and endorsements made upon each of them "Refused, Gamble, Judge" (R. 113-116). After the refusal of the foregoing written charges, the defendant Telegraph Company then requested written charges numbered 15 to 22 inclusive, charging the jury that under the Company's regulations on file with the Interstate Commerce Commission in no event could the Company be held liable for more than $50.00 and interest (R. 116-118). The court also refused to give these written charges. After the jury had returned a verdict for the plaintiff for the full amount claimed, the defendant duly filed a motion for a new trial, again complaining of the refusal of the court to allow the Federal defenses. (R. 119-120.) Motion for new trial was refused (R. 121). Whereupon, the defendant Telegraph Company took an appeal to the Court of Appeals of Alabama, in which appeal the petitioner Telegraph Company duly assigned as error (R. 124-127) all the rulings of the trial court denying petitioner the benefit of the Federal defenses as against the complaint alleging gross negligence. None of the assignments of error were held good by the Court of Appeals of Alabama, which court, except as hereafter mentioned, has final jurisdiction of suits at law where the amount involved does not exceed one thousand dollars (Code of Alabama 1923, Sec. 7309); and on October 26, 1926, said Court affirmed the judgment of the Circuit Court of Butler County, Alabama (R. 129) (*Western Union Telegraph Co. v. Priester*, 21 Ala. App. 587). Whereupon petitioner on November 4, 1926, duly filed its application for rehearing in said Court of Appeals of Alabama, supported by a brief (R. 130-134), which application was overruled on November 9, 1926 (R. 134). On November 22, 1926 (R. 147), petitioner filed in the Supreme Court of Alabama, which Court has supervisory power over the Court of Appeals under Section 140 of the Constitution of Alabama, a petition for certiorari to the Court of Appeals of Alabama (R. 136), which petition was denied by the Supreme

Court of Alabama on January 13, 1927 (R. 148) (*Western Union Telegraph Co. v. Priester*, 215 Ala. 435).

Petitioner thereupon applied to this Court by separate petitions for writs of certiorari to review both the judgment of the Court of Appeals and that of the Supreme Court of Alabama, both of which petitions were granted on April 18, 1927 (R. 149).

SUMMARY OF ARGUMENT.

I.

Whatever the earlier rule may have been, it is settled that since the Act of 1910, bringing telegraph companies under the Interstate Commerce Act, the fact that the plaintiff alleges and the jury finds that the telegraph company's negligence is "gross" cannot operate to increase the company's liability beyond the amount specified in the applicable clause of the published tariffs.

II.

This case involves a simple error in an unrepeated message, and the applicable clause of the published tariffs is that which limited the company's liability to the amount received for sending the message.

III.

There was no evidence that the negligence was "gross," as distinguished from simple, if that question were at all material.

IV.

If the degree of negligence were at all material, it was fatal error to charge the jury that they might find the defendant liable if it failed to "Bestow the care and skill which the situation demanded"—i. e., if the defendant was guilty of nothing more than simple negligence.

V.

In any event the plaintiff could not possibly have been entitled to more than $50, the amount at which the message was valued.

CONCLUSION:

The judgment should be reversed and the cause remanded to the appropriate State court for further proceedings not inconsistent with the Federal rule limiting the liability to the amount paid for the message.

ARGUMENT.

I.

Whatever the earlier rule may have been, it is settled that since the Act of 1910, bringing telegraph companies under the Interstate Commerce Act, the fact that the plaintiff alleges and the jury finds that the telegraph company's negligence is "gross" cannot operate to increase the company's liability beyond the amount specified in the applicable clause of the published tariffs.

Before telegraph companies were declared to be common carriers for the purposes of the Interstate Commerce Act, by the Act approved June 18, 1910, 36 Stat. L 539, the relations between telegraph companies and their patrons were purely relations of contract.

The question repeatedly arose, and was differently decided in different jurisdictions, whether such companies could be permitted, as a matter of public policy, to limit their liability for errors and delays. Usually the specific question for decision was as to the validity of a provision in the message contract that the company should not be liable for mistakes or delays in the transmission or delivery of an unrepeated message beyond the amount received for sending the same.

Many State courts had held that telegraph companies were in the nature of common carriers, and that it was contrary to public policy to permit them to contract against liability for their own negligence. Since the question never arose unless the telegraph company had been guilty of some negligence, the rule applied by these State courts amounted in ef-

fect to holding that the limitation of liability for unrepeated messages was of no validity whatever.

In other states it was held that telegraph companies were not common carriers, and that no principle of public policy forbade them from limiting their liability, if the limitation was assented to by the sender. Most of these states, however, and notably New York and Massachusetts, were committed to the doctrine that with respect to contracting against liability for the negligence of one's servant a distinction was to be drawn between cases of ordinary negligence on the one hand and cases of gross negligence or wilful misconduct on the other; and the decisions sustaining the right of the telegraph company to limit its liability by contract were usually qualified by the statement that the contract was valid in the absence of gross negligence or wilful misconduct.

This court, in *Primrose v. Western Union*, 154 U. S. 1, was called on to choose between these two conflicting lines of authority; and it chose to approve and adopt the rule that telegraph companies were not common carriers, and might limit their liability for unrepeated messages to the amount received for sending the same. In reaching this result, the court cited and quoted from the opinions of the New York and other State courts, including some expressions of those courts to the effect that the contract was valid in the absence of gross negligence or wilful misconduct; but except as the quotation of these excerpts from state opinions might be supposed to indicate approval of everything that was said therein, there was no independent expression of opinion by this court, in the Primrose case or in any other case, to the effect that there was any magic in the term "gross" negligence that would invalidate the message contract.

On the contrary, this court had consistently refused to recognize that there was any legal distinction between the different degrees of negligence, and had apparently inclined to

if not definitely adopted the view that gross negligence is nothing but negligence with the addition of a vituperative epithet.*

The fact that the decisions of certain State courts recognizing a distinction between gross and simple negligence for this purpose were quoted by this court without disapproval of the distinction apparently led certain of the inferior Federal courts to assume that in telegraph cases, although perhaps in telegraph cases alone, such a distinction should be recognized (*Postal Telegraph-Cable Company v. Nichols,* 159 F. 643; *Fleischner v. Pacific Postal-Tel. Co.,* 55 F. 738; *White v. Western Union,* 14 F. 710); but no other case involving the question came here after the Primrose case was decided until the entire situation was revolutionized by the Act of 1910.

Attached hereto as an Appendix for the convenience of the Court is a History of Telegraph Stipulations and Regulations limiting Liability.

**Philadelphia & Reading Railroad v. Derby,* 14 Howard 468, 485, 486;
The New World v. King, 16 How. 469, 474;
Milwaukee & St. Paul Railroad Co. v. Arms, 91 U. S. 484, 493, 494, 495.

In the last-named case, the court cited with apparent approval the remark of Lord Cranworth (Baron Rolfe) in *Wilson v. Brett,* 11 M. & W. 113 (1843), to the effect that there was "no difference between negligence and gross negligence—that it was the same thing, with the addition of a vituperative epithet"; as well as the language of Mr. Justice CURTIS in *The New World v. King* (*supra*) that the distinction between gross negligence and ordinary negligence had better be abandoned. The same suggestion was made by Mr. Justice STORY (Bailments, Section 11).

Degree of Negligence Immaterial Since the Act.

In 1921 this court decided the case of *Western Union v. Esteve Brothers,* 256 U. S. 566. That case involved a message which had been sent from Spain to New Orleans. It came into the hands of the defendant telegraph company at Havre, France, under such circumstances that it could not be shown that the sender had assented to any contract limiting defendant's liability. It was nevertheless held that the sender (and addressee) were bound by the usual limitations of liability contained in the company's published tariffs. Justice BRANDEIS said:

> "The Act of 1910 introduced a new principle into the legal relations of the telegraph companies with their patrons which dominated and modified the principles previously governing them. Before the Act the companies had a common law liability from which they might or might not extricate themselves according to views of policy prevailing in the several States. Thereafter, for all messages sent in interstate or foreign commerce, the outstanding consideration became that of uniformity and equality of rates. Uniformity demanded that the rate represent the whole duty and the whole liability of the company. It could not be varied by agreement; still less could it be varied by lack of agreement. The rate became, not as before a matter of contract by which a legal liability could be modified, but a matter of law by which a uniform liability was imposed. Assent to the terms of the rate was rendered immaterial, because when the rate is used, dissent is without effect. This principle was established in cases involving the limitation upon a carrier's liability for baggage by *Boston & Maine Railroad v. Hooker,* 233 U. S. 97, and *Galveston & San Antonio Ry. Co. v. Woodbury,* decided by this court December 13, 1920. In the former case it was said, 'If the charges filed were un-

reasonable, the only attack which could be made upon such regulation (limiting liability) would be by proceedings contesting their reasonableness before the Interstate Commerce Commission. While they were in force they were equally binding upon the railroad company and all passengers whose baggage was transported by carriers in interstate commerce.' So here the limitation of liability attached to the unrepeated cable rate is binding upon all who send messages to or from foreign countries until it is set aside as unreasonable by the Commission."

It is obvious without argument that in view of this radical change in the relationship between telegraph companies and the public there is no longer any question to be submitted to the triers of the facts—if it was ever proper to submit such a question to them—as to the various shades or degrees of intensity of the fault committed in a particular case by the human agents through which the telegraph company, like other companies, is compelled to conduct its work. The limitation of liability is a part of the rate. If a patron selects the lower rate and is allowed to recover beyond the limitation (which is a part of it) in any case in which a jury may find that the fault was particularly reprehensible, there is an end of uniform liability, and telegraph law is back in the chaotic condition where it was before the act. What one jury may decide is no precedent for any other jury; if the matter is to go to the jury at all, the company can never be certain in any particular case that the finding will not be on the side of "grossness"; and if there is any doubt on the subject a settlement of the claim, even beyond the maximum limitation provided for in the tariff, cannot be criticized as an unlawful preference and may indeed be only common prudence; so the salutary reform effected by the act as interpreted by this court in the Esteve and other cases is undone.

There is no longer any question for the judicial branch of the Government as to whether public policy permits telegraph

companies to limit their liability for unrepeated messages. The legislative branch of the Government has decided that question. The act of 1910 provides that telegraph messages

> "may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such *other* classes as are just and reasonable, and different rates may be charged for the different classes of messages";

and taken in connection with the history of telegraph message contracts and the development of the law applying to them, including this court's decision in the Primrose case, this Congressional permission can mean nothing else than that, subject to the supervision of the Interstate Commerce Commission as to the reasonableness of the limitations, telegraph companies shall be free to proportion their liabilities to their rates and that no patron shall be entitled to be preferred over any other by a settlement of his claim for an amount beyond the maximum protection to which the rate which he has selected entitles him.

II.

This case involves a simple error in an unrepeated message, and the applicable clause of the published tariffs is that which limited the company's liability to the amount received for sending the message.

In *Western Union v. Czizek*, 264 U. S. 281 (1924), the precise question involved in this case was considered and decided. The message here was sent at a time when the telegraph company had in effect and on file with the Interstate Commerce Commission the same message tariffs which were considered in the Czizek case. That is to say, there was a limitation of liability for unrepeated messages to the amount received for sending the same, and a further provision that the company should not be liable in any event beyond the sum of $50, at which amount the telegram was valued by the sender; there

being the usual provision for an assumption of a greater liability in the case of a higher valuation and the payment of a slightly increased rate, the amount of which increase had been approved by the Interstate Commerce Commission (44 I. C. C. 670, 677).

In the *Czizek* case, however, there was no error in the message. The message had never been sent at all; and not only that, but the company had mistakenly informed the sender, when he inquired, that it had been sent and had been delivered, thereby preventing him from ordering it repeated or duplicated, or making any further effort to communicate with the addressee. The circuit court of appeals had held that the conduct of the defendant amounted to gross negligence ("neither this testimony nor the findings of the court respecting it can be regarded as adequate to overcome this court's prior holding that *the case is one of gross negligence* on the part of the plaintiff in error for failure to transmit", Wolverton, J., 286 F. 478, 1923); and the question here was whether that circumstance was sufficient to support a recovery in excess of the amount of the valuation. This court said:

> "When the message is valued it may be doubted whether the valuation can be affected by the intensity of the vituperative epithet applied to an admitted fault. *Kirsch v. Postal Telegraph Cable Co.*, 100 Kan. 250, 252, 264 Pac. 267. At all events something more would have to be shown than is proved here to take the case out of the general rule. The act of the receiving clerk cannot reasonably be supposed to have been more than a momentary inadvertence. It was not a wilful wrong."

The first paragraph of the head-note in the Kirsch case, cited by Mr. Justice HOLMES, explicitly announces the conclusion that

> "an interstate telegraph company may by contract limit its liability for nondelivery of an unrepeated message to

the amount paid for its transmission, even in case of gross negligence."

The reason why this court in the *Czizek* case refused to permit recovery in excess of the valuation is plain, and there is no conceivable ground on which the State courts of Alabama could have been justified in refusing to recognize the authority of the *Czizek* case, at least to the extent of limiting the recovery here to $50, at which amount this plaintiff also valued his message. It is not so clear why, in the *Czizek* case, the liability was not limited under the unrepeated message clause to the amount received for sending the message. On this point Mr. Justice HOLMES said:

> "We have not adverted to the first clause of the exemptions, limiting liability to the amount received for sending the message. Obviously this has a narrower scope than the valuation clause and we should hesitate to hold that it exonerated the defendant in this case. Unrepeated Message Case, 61 I. C. C. 541".

61 I. C. C. 541 must be read in connection with the prior opinion of the commission in the same proceeding, 44 I. C. C. 670, in which it was said, by way of comment on the difference between the two limitations of liability:

> "The fundamental difference between the unrepeated rate and the other two classes of rates is that under the former the sender *assumes the risk of error or delay* while under the latter the carrier assumes the risk in part or entirely, as the case may be; and the rules fixing the measure of the defendant's liability under these several classes of rates are essentially a part of the rates themselves." (44 I. C. C. 676).

We attribute the refusal of this court in the Czizek case to apply the unrepeated message stipulation in that case, with the effect of limiting the liability to the amount paid for the message, to its conclusion that in the special case of the mes-

sage tariffs then in force for the Western Union Telegraph Company that company had not undertaken or assumed to limit its liability for unrepeated messages except for mistakes and delays; and that in a case where the message had never been sent at all it was intended by the company to assume liability up to $50.00 and understood by the Interstate Commerce Commission that the $50 valuation clause was the only protection which the telegraph company would claim. This conclusion is reinforced by the fact that a different result had been reached by this court as to the tariffs of the Postal Telegraph-Cable Company, which formerly had no valuation clause, and relied solely on the unrepeated-message stipulation. In *Dickerson v. Western Union and Postal*, 74 So. 779, 114 Miss. 115, the complaint alleged that a message filed with the Postal Company had not been sent at all, through the Postal Company's "wilful, wanton, and gross neglect"; the Postal pleaded the unrepeated condition as a defense; the plea was demurred to and the demurrer overruled; the plaintiff having declined to plead further the complaint was dismissed; and the supreme court of Mississippi reversed the judgment of dismissal and held that the demurrer to the plea should have been sustained. After a new trial and judgment for the plaintiff and an affirmance by the supreme court of the State, 79 So. 719, the case was brought to this court on ceriorari and reversed with a per curiam opinion:

> "Per curiam. Reversed upon authority of *Postal Telegraph Cable Company v. Warren Godwin Lumber Company*, 251 U. S. 27; *Western Union v. Boegli*, 251 U. S. 315."

(254 U. S. 609, 1920). This case seems to have squarely presented the issue whether the unrepeated message stipulation, in the tariffs applicable to an interstate message, could be avoided by the allegation that the negligence was gross; and this court did not deem the matter worthy of a special opinion.

In the present case the only fault complained of is a simple error. The clause of the tariffs which limits liability for mis-

takes in unrepeated messages to the amount received for sending the same is intended to and does apply to this case if it applies to any case at all. It is not alleged or pretended that there was any wilful or wanton wrong. If the sender of an interstate message can escape from the limitation of liability which goes with the rate which he has selected and paid by the simple expedient of labeling the defendant's fault as "gross", the tariff limitation is of no value or significance whatever. The decisions of this Court that, on the contrary, it is valid and must be respected by the States are not to be evaded by any such transparent, not to say flimsy, device.

III.

There was no evidence that the negligence was "gross," as distinguished from simple, if that question were at all material.

If there were any significance in the distinction between gross and simple negligence in this class of cases, this court, where the Federal question has been duly raised, would be permitted and required to examine the record for the purpose of seeing whether there was *any evidence* offered at the trial to support the conclusion that the negligence was gross as distinguished from simple.

The only evidence on that subject in this case is to be found in the testimony of the sending and receiving operators, called as witnesses by the defendant, and the testimony of a former operator named May, called as a witness for the plaintiff in rebuttal (Record, pages 101 to 108).

The sending operator testified that he sent the word in question as "fifty"; that an expert operator would know the difference between the symbols for *fifteen* and *fifty*, "but any experienced operator could make an error" (page 101). The receiving operator testified that he wrote the message down as he understood it, and that he understood the word in question

as "fifteen" (pages 103, 104.). Neither of these operators had any previous acquaintance with either the plaintiff or the addressee of the message, or had any anger, resentment or ill-feeling with regard to either of them (pages 99, 103.) The difference between the Morse symbols for "fifty" and "fifteen" was explained; but the receiving operator handled five hundred messages a day (page 105), and after hearing the sound of the telegraph instrument as the message comes over the wire that sound has to be translated in the operator's brain from a conventional symbol into an English word, which in turn the brain must direct the finger to imprint on paper by means of the typewriter (page 108).

The plaintiff's witness, the former operator, testified:

> "The symbol for the letter 'y' in fifty is entirely different from the symbols for the letters 'een'. * * * Any competent operator with experience can tell the difference between the symbols for the letter "y" and the letters 'een'. * * * If a message is sent with the word fifty spelled out and is transmitted over the wire with the apparatus in perfect working condition it would be received as *fifty*. It would not be received as *fifteen*." (P. 107.)

That was the plaintiff's whole case. If that shows gross negligence, what would ordinary negligence be? There is no pretense that the operators were generally incompetent or unskillful. The receiving operator had had about twelve years' experience (p. 103) and the sending operator a year and a half or two years (p. 101). The instrument in the receiving operator's office "was the best in use and in perfect condition" (page 106). The equipment in the sending office was "a recognized standard telegraph machine, the best in use" (page 99). Any wire, long or short, may be interrupted from a variety of causes—rain, wind or induction of some kind (page 107).

It is obvious that this is merely the ordinary case of an error in transmission, without any unusual features and with no element whatever of exaggerated culpability. What was proved here could be proved by the plaintiff in any case of error. Indeed it is remarkable if the plaintiff does not feel, like Lord Clive, that when his opportunities are considered he should be astounded at his own moderation. In substance, he has proved—what was never denied—that the error occurred, and that if both operators are competent and attentive such an error should not occur ordinarily. If it is said that this makes a prima facie case of simple negligence, that may be granted; but it is not gross negligence unless all negligence is gross negligence and unless this Court erred in its carefully-considered opinion in *Postal Tel.-Cable Co. v. Warren-Godwin Lumber Co.*, and its reversal *per curiam* of W. U. Tel. Co. v. Southwick (*supra.*)

IV.

If the degree of negligence were at all material, it was fatal error to charge the jury that they might find the defendant liable if it failed to "Bestow the care and skill which the situation demanded"—i. e., if the defendant was guilty of nothing more than simple negligence.

If the degree of negligence were of any importance, obviously the defendant was at least entitled to have the jury instructed as to the difference between the varying degrees of negligence, and that the defendant was not liable unless the jury should find that the plaintiff had shown by a preponderance of the evidence that the negligence was gross as distinguished from merely simple.

Instead of so charging, the trial court told the jury that "negligence is a failure to bestow the care and skill which the situation demands"; that the question which they were to de-

termine is "whether or not under the conditions and circumstances under which this message was delivered and transmitted, the defendant through its agents and servants did bestow the care and skill which the situation demanded they should bestow"; and that "if they did not the plaintiff would be entitled to recover the damages which the testimony * * * shows the plaintiff suffered by reason of the error or mistake of the defendant. That is all there is in the case." (Record, p. 111.)

To the giving of this charge the defendant duly excepted (page 113), as well as to the refusal of a charge that there was no evidence of gross negligence. (Pages 114, 116.)

In a case which was professedly being tried under the Federal rules of law, where the Federal question was repeatedly raised at each successive stage of the proceedings, it is obvious that the judgment would have to be reversed for this reason alone, even if the distinction between gross and simple negligence were to be recognized.

V.

In any event the plaintiff could not possibly have been entitled to more than $50, the amount at which the message was valued.

As has been already pointed out, if the unrepeated-message stipulation were entirely out of the case, there is still no conceivable ground on which the refusal of the State court to follow the *Czizek* case can be supported. Certainly the fault of the defendant in the present case—a simple, every-day error occurring in the transmission from one ordinarily competent operator to another, was no more shocking than the complete failure in the *Czizek* case to put the message on the wire, accompanied by the mistaken statement to the sender that the message had in fact been sent, which the circuit court of ap-

peals had held was gross negligence. "The act of the receiving clerk cannot reasonably be supposed to have been more than a momentary inadvertence", said Justice Holmes in the *Cziszek* case. "It was not a wilful wrong." Certainly the error in the present case was no more wilful and not the less a mere inadvertence.

CONCLUSION.

The judgment should be reversed and the cause remanded to the appropriate State court for further proceedings not inconsistent with the Federal rule limiting the liability to the amount paid for the message.

The reason for our doubt as to whether the writ of certiorari from this court should properly be addressed to the Court of Appeals of Alabama or to the Supreme Court of the State is as follows:

After the petition for certiorari to the Court of Appeals had been filed, it appeared from a memorandum published in the Southern Reporter (111 Sou. 199) that the Supreme Court of the State, in connection with its refusal to review the Court of Appeals, had handed down a short memorandum as follows:

> "Writ denied on authority of *Postal Tel. - Cable Company v. Minderhout*, 195 Ala. 420, 71 Sou. 91 (1916)."

The Minderhout case was one in which the supreme court of Alabama had announced that it *would not* issue certiorari to review the court of appeals except to review a conclusion reached by the court of appeals on a question of law, and specifically that it would not review the court of appeals "upon a finding of facts, or in the application of the law to the facts."

Since the supreme court of the state does not interpret Section 140 of the state constitution, conferring on it supervisory power over the court of appeals, as *prohibiting* review of the court of appeals on questions of fact or the application of the law to the facts, but has merely adopted as a matter of judicial policy the rule that it *will not* review the court of appeals on such questions, it seems clear that the procedure in this case is controlled by *Western Union Tel. Co., v. Crovo,* 220 U. S. 364, and *Norfolk Turnpike Company v. Virginia,* 225 U. S. 264, 269, and that, the supreme court of the state having refused to decide the case (for whatever reason), the writ from this court should run to the court of appeals.

The doubt proceeds from *Matthews v. Huwe,* 269 U. S. 262, where the *jurisdiction* of the highest state court depended on the existence of a Federal constitutional question and where it was held that the higher state court, in deciding that the record presented no debatable constitutional question and *therefore* that there was no jurisdiction, had in effect decided the case.

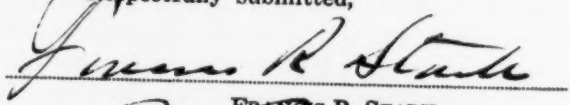
Whether this is so in the present case depends on the meaning, if any, to be attached to the memorandum of the supreme court of the state assigning as *the reason* for refusing to review the lower court, that it was "on the authority of *Postal Tel.-Cable Company v. Minderhout*" —*i.e.* that the supreme court of the state *would not* review the lower court on a question of fact or on the application of the law to the facts.

It occurred to us as among the possibilities that it might be urged in this court that in handing down this memorandum the Supreme Court of the State was in effect again deciding what it had already decided on the previous appeal in this case, that gross negligence invalidates the limitations of liability. If this view is admissible, then the Supreme Court again decided the case in holding that such was the law; and

on that theory the writ from this court should run to the Supreme Court of the State.

It seems to counsel for petitioner that, *whatever the reason*, the supreme court of the state refused to decide the case on the last appeal; that this memorandum means no more than the memorandum of the state court in the Crovo case, which stated that in its opinion the judgment "was plainly right"; and that the writ should run to the court of appeals, so that No. 916 should be reversed and remanded to the court of appeals, and No. 958 should be dismissed.

Respectfully submitted,



FRANCIS R. STARK,

RAY RUSHTON,

Attorneys for Petitioner

APPENDIX.

History of Telegraph Stipulations and Regulations Limiting Liability

For a long time even after the Interstate Commerce Commission was established it was not given any jurisdiction over telegraph companies. The Act to Regulate Commerce was enacted on February 4, 1887, but it was not until the amendatory Act of June 18, 1910, that telegraph and telephone companies were made subject to its provisions and declared to be common carriers within the meaning and purposes of the Act. By that amendment jurisdiction over the rates and charges of such companies was conferred upon the Commission, accompanied by the declaration that all such rates and charges must be reasonable and that any unjust rate or charge was unlawful. Section 15 of the Act as then amended authorizes the Interstate Commerce Commission in express language to hear complaints respecting rates and charges for the transmission of messages by telegraph and telephone and to hear complaints respecting classifications, regulations and any practices whatsoever of any carrier subject to the Act. Section 15 also provides that after the Commission has fixed the just and reasonable maximum rate or charge that may lawfully be enacted for the future by the carrier complained of, the latter shall not demand or collect any rate or charge in excess of the rate or charge so prescribed, and there is a proviso to Section 1 of the Act reading as follows:

> "Provided that messages by telegraph, telephone or cable subject to the provisions of this Act may be classified into day, night, repeated, unrepeated, letter, commercial, press, government, and such other classes as are just and reasonable and different rates may be charged for the different classes of messages."

Prior to the 1910 Amendment liabilities of the telegraph companies varied throughout the different states in consequence of differing conclusions reached as to the common law principles involved, and several states had enacted statutes fixing liabilities, at variance with what the courts of the State had held to be the common-law liability of such companies. A number of states had also enacted penalty statutes. The purpose of the Act was to bring about uniformity, not only of rates and charges, but of rules, regulations, service, obligation and liabilities to the message-sending public. The companies are therefore at the present time working under rates, and liabilities which are a part of the rates, which have the force of law. The companies themselves can no more waive or vary the one than the other; and what the companies cannot do voluntarily they may not be compelled to do by the judgment of a State court.

The company is no longer permitted to decide for itself whether it shall settle a claim beyond the limitation of liability provided for by the tariff. Under the Federal statute if the Western Union Telegraph Company in this case had paid to Mr. Priester the amount of his loss, it would have subjected itself to a fine and its responsible officers to imprisonment.

In 1917, J. L. Cultra and Myrtle Cultra, partners, trading as the Clay County Produce Company, brought a suit in the courts of Jackson County in the State of Missouri against the Western Union Telegraph Company based on damages arising out of a telegram sent to them at Clay Center in the State of Kansas by some commission merchants at San Francisco. The telegraph company interposed as defense (a) that the court by the terms of the contract under which the message was sent was limited to an award of nominal damages only, even though the loss claimed was shown to have resulted from defendant's negligence in forwarding the message and (b) that the validity of the provisions in the contract restricting the defendant's liability to nominal damages was not within the

competency of the state court to deny, but presented a Federal question, which the Interstate Commerce Commission alone was authorized by law to consider and deal with. In the light of that contention the trial court held the case in abeyance pending a ruling by the Interstate Commerce Commission, and the questions presented to the Interstate Commerce Commission for decision were substantially as follows: (a) whether the Congress by the Act of June 18, 1910, amending the Act to Regulate Commerce, has vested in the Interstate Commerce Commission such jurisdiction over the rates and practices of telegraph companies as to bring under its control and within its regulating power the rules of such companies concerning their liability for damages incurred by reason of error or delay in the transmission or delivery of interstate messages; and (b) whether, if the Interstate Commerce Commission had such jurisdiction, the rules of the telegraph companies with respect to these matters were reasonable, and whether they were consistent with sound public policy. The message contract in the Cultra case was identical with the message contract in this case, except for the fact that in the Cultra case the despatch was a night letter and in this case a day message. The Commission on May 17, 1917, rendered an opinion in which, among other things, it said:

> "If, as a matter of law, as the complainants contend, the rate charged and collected for an unrepeated message carries with it the same protection to the sender or recipient and imposes upon the telegraph company the same liability and degree of care as the rate for a repeated message, then the express authority by the Congress to maintain classifications of repeated and unrepeated messages, with the different rates attached thereto, is *without significance* or effect; for no useful purpose would have been served in authorizing the two classifications taking different rates without recognizing the fundamental difference between them that for years has been well understood and maintained. It seems clear,

therefore, that the Congress in recognizing, by the amendment to the Act above quoted, these three classes of messages with the different charges attached, has also recognized a distinction in the defendant's liability under them, and has sanctioned this distinction for the future, subject of course to the general provisions in the Act requiring all rates, and all rules and regulations affecting rates, to be reasonable and uniform in their application, under like circumstances, for the different kinds of service offered. Such classification of its messages with the different rates and liabilities attaching to them having affirmative recognition in the Act itself, it follows that when lawfully fixed and offered to the public they are binding upon the defendant and upon all those who avail themselves of its services, until they have been lawfully changed * * * * *.

"Our conclusion upon the record is that the Congress, by the language used in the Amendatory Act of 1910, has manifested a definite intention to place under the jurisdiction and control of this Commission the rates and practices of interstate telegraph companies, as well as the rules, regulations, conditions, and restrictions affecting their interstate rates; that the rate voluntarily used by the senders of the message in question was an unrepeated rate to which was lawfully attached, and as a fundamental feature of it, the *restricted liability* insisted upon here by the defendant; that the Congress has expressly authorized such rates with a restricted liability attached; that such rates are not therefore contrary to public policy but on the contrary are binding upon all until lawfully changed; and that neither the interstate rates of the defendant nor the rules, practices, conditions, and restrictions affecting those rates have been shown in this proceeding to be unreasonable or otherwise unlawful." 44 I. C. C. 670.

The opinion of the Interstate Commerce Commission in the *Cultra Case* was approved and its reasoning adopted by this

Court in the case of *Postal Telegraph Cable Company v. Warren-Godwin Lumber Company,* 251 U. S. 27, 64 L. Ed. 118. That case was before this Court on a writ of certiorari to the Supreme Court of Mississippi to review a judgment which reversed, with an instruction to enter judgment for the plaintiff, a judgment of the Circuit Court of Hines County in favor of the telegraph company in a suit against it for error in transmitting an unrepeated interstate message. The Supreme Court of Mississippi in the case of *Western Union Telegraph Company v. Showers,* 104 Miss. 411, 73 So. 276, had decided that the Act of June 18, 1910, had operated to exert the power of Congress over telegraph companies as to their interstate business and contracts, and that the unrepeated-message stipulation of the telegraph company was valid and enforceable. In a later case, *Dickerson v. Western Union Telegraph Company,* 114 Miss. 115, 74 So. 779, the Mississippi Court had held that the ruling previously made by it in the *Showers case* as to the operation of the Act of 1910 was erroneous, and in the case of *Postal Telegraph Company v. Warren-Godwin Lumber Company,* following its ruling in the *Dickerson case,* it decided against the validity of the unrepeated-message stipulation, and the case was brought before this Court by writ of certiorari. In the course of its opinion, this Court, speaking through Chief Justice WHITE, said:

> "In the first place, as it is apparent on the face of the Act of 1910 that it was intended to control telegraph companies by the Act to Regulate Commerce, we think it clear that the Act of 1910 was designed to and did subject such companies as to their interstate business to the rule of equality and uniformity of rates which it was manifestly the dominant purpose of the Act to Regulate Commerce to establish—a purpose which would be wholly destroyed if, as held by the court below, the validity of contracts made by telegraph companies as to their interstate commerce business continued to be subjected to the control of divergent, and it may be conflicting, local laws.

"In the second place, as in terms the Act empowered telegraph companies to establish reasonable rates, subject to the control which the Act to Regulate Commerce exerted, it follows that the power thus given, limited, of course, by such control, carried with it the primary authority to provide a rate for unrepeated telegrams and the right to fix a reasonable limitation of responsibility where such rate was charged, since, as pointed out in the Primrose case, the right to contract on such subject was embraced within the grant of the primary rate-making power.

"In the third place, as the Act expressly provided that the telegraph, telephone or cable messages to which it related may be 'classified into day, night, repeated, unrepeated, letter, commercial, press, government and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages', it would seem unmistakably to draw under the Federal control the very power which the construction given below to the Act necessary excluded from such control. Indeed, the conclusive force of this view is made additionally cogent when it is considered that, as pointed out by the Interstate Commerce Commission (*Cultra v. Western Union Telegraph Co.*, 44 Inters. Com. Rep. 670), from the very inception of the telegraph business, or at least for a period of forty years before 1910, the unrepeated message was one sent under a limited rate and subject to a limited responsibility of the character of the one here in contest.

"But we need pursue the subject no further, since, if not technically authoritatively controlled, it is in reason persuasively settled by the decision of the Interstate Commerce Commission in dealing in the case above cited with the very question here under consideration as the result of the power conferred by the Act of Congress of 1910; by the careful opinion of the Circuit Court of Appeals of the Eighth Circuit dealing with the same

subject (*Gardner v. Western Union Telegraph Co.* 145 C. C. A. 399, 231 Fed. 405) and by the numerous and conclusive opinions of state courts of last resort, which, in considering the Act of 1910 from various points of view, reached the conclusion that that Act was an exertion by Congress of its authority to bring under Federal Control the interstate business of telegraph companies, and therefore was an occupation of the field by Congress which excluded state action."

In the case of *Western Union Telegraph Company v. Boegli*, 251 U. S. 315, 64 L. Ed. 281, this Court had before it the validity of a State statute of Indiana imposing a penalty upon telegraph companies for failure to deliver telegrams, the message involved being an interstate one. This Court held the State statute to be without effect upon interstate messages, and in its opinion, again speaking through Chief Justice White, said:

> "We are of opinion that the provisions of the statute bringing telegraph companies under the Act to Regulate Commerce, as well as placing them under the administrative control of the Interstate Commerce Commission, so clearly established the purpose of Congress to subject such companies to a uniform national rule as to cause it to be certain that there was no room thereafter for the exercise by the several states of power to regulate, by penalizing the negligent failure to deliver promptly an interstate telegram, and that the Court below erred, therefore, in imposing the penalty fixed by the State statute."

The question was again before this Court in the case of *Western Union Telegraph Company v. Southwick*, 255 U. S. 565, 65 L. Ed. 788, involving, like the present case, an error in an interstate telegram. In a *per curiam* opinion the Court reversed and remanded the case for further proceedings "upon

the authority of *Postal Telegraph Cable Co. v. Warren-Godwin Lumber Company*, 251 U. S. 27, 64 L. Ed. 118; *Western Union Telegraph Co., v. Boegli*, 251 U. S. 315, 64 L. Ed. 381."

In the case of *Dickerson v. Western Union Telegraph Co.*, 114 Miss. 115, 74 So. 779, referred to by this Court in the opinion in the *Warren-Godwin Lumber Company case*, the Mississippi Court had had before it the validity of the unrepeated message stipulation as applied to a case wherein the plaintiff alleged "gross, wilful, and wanton negligence of the defendants" (Western Union Telegraph Company and Postal Telegraph Company, the suit being against the two Telegraph Companies jointly). As stated above, in that case the Supreme Court of Mississippi held that the Act of 1910 did not apply. The case as against the Western Union Telegraph Company was finally discontinued, but it was prosecuted to judgment against the Postal Telegraph Cable Company,—*Postal Telegraph Cable Company v. Dickerson*, 79 So. 719. A writ of certiorari from this Court was granted, and the judgment of the State court was reversed upon the authority of *Postal Tel. Cable Co. v. Warren-Godwin Lumber Co.* and *Western Union Telegraph Company v. Boegli, supra.* (*Postal Tel. Co. v. Dickerson*, 254 U. S. 609, 65 L. ed. 436.)

The case of *Western Union Telegraph Company v. Esteve Bros.*, 256 U. S. 566, 65 L. Ed. 1099, involved the application of the Telegraph Company's stipulations on file with the Interstate Commerce Commission to messages not written on the Company's blanks and where the contract of transmission was without specific reference to the rules and regulations of the telegraph company. The plaintiff in the lower court had recovered a verdict for $31,095.00, which was affirmed by the United States Circuit Court of Appeals for the Fifth Circuit (268 Fed. 22). The Telegraph Company contended that since the message had not been repeated the verdict should be limited to the amount of toll paid. This Court, speaking by Mr. Justice BRANDEIS, said:

"The Act of June 18, 1910, Chap. 309, Sec. 7, 36 Stat. at L. 539, Comp. Stat., Secs. 993, 8563, 5 Fed. Stat. Anno. 2nd Ed. p. 1108, 4 Fed. Stat. Anno. 2nd ed. p. 337, broadened the scope of the Act to Regulate Commerce to include 'telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from a State * * * to any foreign country.' And whatever may have been the legal incidents of transmitting the message from Barcelona to Havre under Spanish and French law, the Western Union, in sending the message over its own lines from Havre to New Orleans, was governed by the proviisons of that Act. *Galveston H. & S. A. R. Co. v. Woodbury*, 254 U. S. 357, ante 301, 41 Sup. Ct. Rep. 114. In the third paragraph of Section 1 of the amended Act, Congress provided that messages might be 'classified into day, night, repeated, unrepeated, letter, commercial, press, government and such other classes as are just and reasonable, and different rates (might) * * * * * be charged for the different classes of messages.' Acting, in May, 1916, under the authority of that provision, the Western Union, by appropriate action, approved the tariff involved in the present case, and, by permission of the Interstate Commerce Comission, filed with it the tariff, including the provisions here in question. The company was not required so to do by the terms of the Act or by any order of the Commission; compare 25th Annual Report I. C. C. (1911) pp. 5, 6. But the rate, long before established, then formally adopted and filed, was thereafter the only lawful rate for an unrepeated message, and the limitation of liability became the lawful condition upon which it was sent. *Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co.*, 251 U. S. 27, 30, 64 L. Ed. 118, 120, 40 Sup. Ct. Rep. 69; *Cultra v. Western Union Telegraph Co.*, 44 Inters. Com. Rep. 670, 674.

"The lawful rate having been established, the company was, by the provisions of Sec. 3 of the Act to Regulate

Commerce, prohibited from granting to any one an *undue preference or advantage* over the public generally. For as stated in *Postal Telegraph Cable Co. v. Warren-Godwin Lumber Co., supra,* 30, the 'Act of 1910 was designed to and did subject such companies, as to their interstate business, to the rule of equality and uniformity of rates'. If the general public, upon paying the rate for an unrepeated message, accepted substantially *the risk of error involved* in transmitting the message, the company could not, *without granting an undue preference or advantage, extend different* treatment to the plaintiff here. The limitation of liability was an inherent part of the rate. The company could *no more depart from it* than it could *depart from the amount charged for* the service rendered.

"The Act of 1910 introduced a *new principle* into the legal relations of the telegraph companies with their patrons which dominated and modified the principles previously governing them. *Before* the Act the companies had a *common-law liability,* from which they might or might not extricate themselves, according to views of policy prevailing in the several states. Thereafter, for all messages sent in interstate or foreign commerce, the outstanding consideration became that of uniformity and equality of rates. Uniformity demanded that the rate represent the *whole duty* and the *whole liability* of the company. It could not be varied by agreement; still less could it be varied by lack of agreement. The rate became, *not, as before, a matter of contract,* by which a legal liability could be modified, but a matter of law, by which a *uniform liability* was imposed. Assent to the terms of the rate was rendered immaterial, because, when the rate is used, dissent is without effect. * * * * * . The repeated rate, offering greater accuracy and greater liability in case of error, was open to anyone who wished to pay the extra amount for extra security." (Italics supplied.)

As a result of the proceeding brought by J. L. and Myrtle Cultra against the Western Union Telegraph Company, before the Interstate Commerce Commission, that Commission entered into a general investigation of the practices of telegraph companies subject to the Interstate Commerce Act, with respect to adjusting claims for damages arising from error or delay in the transmission or delivery, or from non-delivery, of interstate messages, and the reasonableness of their rules limiting liability on the several classes of messages in accordance with the rate paid. The result of the investigation is found in 61 I. C. C. 541. In explaining the classes of messages offered by telegraph companies to the public the Commission said:

> "Briefly, they offer the sender his choice of three classes of messages, unrepeated, repeated, and valued, with different rates for each class, dependent upon the service to be performed and the liability to be assumed. As a condition attaching to the transmission of a message at the lowest, or unrepeated rate, it is stipulated that the company shall not be liable for mistakes, delays, or non-delivery beyond the amount received for sending it; and it appears that, unlike the Western Union, the Postal Company steadfastly adheres to that limitation. But to protect the sender against possible loss in the event of errors in transmission, the respondents offer the second, or repeated, class of messages at a rate one and one-half times the rate for the same message if unrepeated. For this additional rate they agree to assume liability to the extent of fifty times the rate paid, with a maximum liability in the case of the Western Union of $50. The third class of messages, for the transmission of which the rate charged is the repeated rate plus a surcharge of one-tenth of one per cent of the valuation, is designed to insure the sender against any loss within the value placed upon the message. To afford protection against extravagant claims for damages on account of errors or delays which a repe-

tition of the message would not have prevented, provision is made by the Western Union for a limitation of liability to $50.00, in practice applied both to unrepeated and repeated messages, and by the Postal Company, in the case of repeated messages, to fifty times the repeated rate, which, unless a greater value is declared, is the agreed value of the message This provision on the part of the Western Union is alleged to be necessary in jurisdictions where the unrepeated stipulation is held not to avail."

The Commission found that the Western Union had made a practice of settling or adjusting what it considered meritorious claims for loss arising from mistakes or delays in the transmission or delivery of messages in spite of its rules and regulations and that the Postal Company had strictly followed the limitations of liability imposed by the various rates offered to the public. The Commission condemned this practice on the part of the Western Union and ordered it to desist therefrom. In the course of its opinion the Commission said:

"At the hearing on March 1, 1920, the contention was urged that a telegraph company, as a common carrier, may not lawfully undertake by contract, rule, regulation, or in any manner to exempt itself from full liability for errors or delays in the transmission of messages, and that all such rules restricting the liability are void. This question is foreclosed by the decisions of the Supreme Court in the *Primrose Case* and in *Postal Telegraph-Cable Co. v. Warren-Godwin Co.*, 251 U. S. 27."

As a result of its investigation into the reasonableness of the rules and regulations of telegraph companies the Commission decided that the stipulation limiting recovery in the case of unrepeated messages to the toll paid and to fifty times the toll paid in the case of repeated messages would thenceforth be unreasonable, and as a result of this finding the tariffs of telegraph companies have been changed so that now the liabil-

ity in the case of a message for the transmission of which the unrepeated rate is charged is five hundred dollars, and for a message received for transmission at the repeated rate, but not specially valued, five thousand dollars. As this decision of the Commission was made after the sending of the message involved in this suit it of course has no application thereto. See 61 I. C. C. 541.

In the case of *Western Union Telegraph Company v. Czizek*, 272 Fed. 223, 286 Fed. 478, a judgment against a telegraph company on a verdict based upon gross negligence on the part of the defendant company in the handling of a message was sustained by the Circuit Court of Appeals for the Ninth Circuit. The message was never started on its journey, but by error of the receiving clerk was placed on the wrong hook. The telegram was an unrepeated message, and the Company pleaded among other defenses the unrepeated message stipulation and the fifty-dollar-valuation clause. The Circuit Court of Appeals held that neither of these stipulations applied where the telegraph company was guilty of *gross negligence*. On a writ of certiorari from this court, it reversed the judgment of the Circuit Court of Appeals—*Western Union Telegraph Co. v. Czizek*, 264 U. S. 281, 68 L. d. 682. Mr. Justice HOLMES said:

> "The moment that the message is received the contract attaches along with the responsibility, and the transit begins. We can perceive no legal distinction between that moment and the next, when the message is handed to a transmitting clerk, or that on which a copy is given to a boy at the further end. The hand that holds the paper technically is that of the company, but no more at the beginning than at the end; and as in fact it is that of servants, reasonable self-protection is allowed to the master against their neglects. One such self-protection sanctioned by the decisions is a valuation of the message, with liberty to the sender to fix a higher

value on paying more for it. *Adams Express Co. v. Croninger*, 226 U. S. 491, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257, 33 Sup. Ct. Rep. 148. The plaintiff finds no difficulty in valuing the message now. It was at least equally possible to value it when it was sent. See *Western Union Telegraph Co. v. Esteve*, 256 U. S. 566, 65 L. Ed. 1094, 41 Sup. Ct. Rep. 584; *Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co.* 251 U. S. 27, 64 L. Ed. 118, 40 Sup. Ct. Rep. 69.

"When the message is valued, it may be doubted whether the valuation can be affected by the intensity of the vituperative epithet applied to an admitted fault. *Kirsch v. Postal Telegraph Cable Co.* 100 Kan. 250, 252, 164 Pac. 267. At all events, something more would have to be shown than is proved here to take the case out of the general rule. The act of the receiving clerk cannot reasonably be supposed to have been more than a momentary inadvertence. It was not a wilful wrong. The answers to the inquiries were probably the natural consequence of the first error, and the second answer probably was too late to have had any effect upon the plaintiff's position. See *Primrose v. Western Union Telegraph Co.*, 154 U. S. 1, 38 L. Ed. 882, 889, 14 Sup. Ct. Rep. 1098. With regard to the amount of the valuation, if it is too low now (Unrepeated Message Case, 61 Intrs. Com. Rep. 541), it was reasonable in 1917. (*Primrose v. Western Union Telegraph Co. supra; Unrepeated Message Case*, 44 Intrs Com. Rep. 670.) Whatever effect may be given to the judgment of the Commission in the latter case, it was not intended to be retroactive. The rules prescribed by the Commission were to be in effect on July 13, 1921.

"We have not adverted to the first clause of the exemptions limiting liability to the amount received for sending the message. Obviously, this has a narrower scope than the valuation clause, and we should hesitate to hold that

it exonerated the defendant in this case. *Unrepeated Message Case*, 61 *Intrs. Com. Rep.* 541."

The Court held that the plaintiff should be limited in his recovery to fifty dollars, the amount at which the message was valued.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1926-27

WESTERN UNION TELEGRAPH COMPANY,
Petitioner

v.

C. H. PRIESTER,
Respondent.

BRIEF OF RESPONDENT ON PETITION FOR CERTIORARI TO THE COURT OF APPEALS OF ALABAMA.

Official Reports of Opinion Delivered in the Courts Below:

W. U. Tel. Co. v. Priester, 18 Ala. App. 531, 93 So. 231;
Priester v. W. U. Tel. Co., 20 Ala. App. 388; 102 So. 372;
Ex parte Priester, 212 Ala. 271; 102 So. 376;
W. U. Tel. Co. v. Priester, 111 So. 199. (Advance Sheet).

GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS DENIED.

1. The action in the State Court was to recover damages for Petitioner's gross negligence in changing a telegram delivered to it at Greenville, Alabama, by respondent for transmission to J. K. Lewis, New Orleans, Louisiana, offering one thousand to fifteen hundred pounds of pecans for sale at fifty cents per pound, so as to read fifteen cents per

pound when delivered, causing an actual loss to respondent of $352.10, besides interest. In holding petitioner liable for gross negligence the decision of the State Courts is in accord with applicable decisions of this Court.

Petitioner's tariffs and classifications on file with the Inter-State Commerce Commission under the amendment to the Inter-State Commerce Act of June 18, 1910 (36 Stat. L. 539) did not authorize petitioner to contract against its gross negligence.

2. The rules and regulations of petitioner limiting its liability for damages for negligence in transmission of unrepeated messages to the amount of the toll paid were unreasonable and not binding on petitioner.

3. Cases believed to sustain resopndent's contention:

Milwaukee & St. Paul Rly. Co. vs. Arms, et al, 91 U. S. 489;
Postal Teleg. Co. vs. Nichols, 159 F. 643;
Priester v. W. U. Teleg. Co., 212 Ala. 271;
Primrose v. W. U. Teleg. Co., 154 U. S. 1;
Redington v. Pacific Postal Teleg. Co., 48 Amer. St. Rep. 132;
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Telegraph Co. v. Griswold, 41 Amer. Rep. 500-506;
White, et al, v. W. U. Teleg. Co., 14 F. 710;
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25 R. C. L., 1054 and 1056;
26 R. C. L., 551-2 and 605;
Unrepeated Message Cases, 8917 and 11524, 61 I. C. C. 541.

STATEMENT OF THE CASE

Respondent, through Southern Bell Telephone and Telegraph Company's office at Fort Deposit, phoned Petitioner's operator at Greenville, Alabama, for transmission to J.

K. Lewis Wholesale Produce Co., 411 Poydras Street, New Orleans, La., the following message:

> "Offer you thousand or fifteen hundred pounds Frotcher's pecans at fifty cents, f. o. b. Ft. Deposit. Answer. C. H. Priester." (R. pp. 49, 50 and 55)

It was correctly transmitted to petitioner's main office in New Orleans. From the main office it was sent by underground tube to Petitioner's operator, Dantoni, at its Cotton Exchange Branch in New Orleans. Dantoni wired it to Petitioner's operator, Engel, at its Board of Trade Office in New Orleans. (R. pp. 97-99)

Petitioner's operator, Dantoni, testified that when the message reached him through the tube it read fifty cents, that it went from Greenville to New Orleans, a distance of three hundred miles, alright, that the message was right before him and he knows he made no mistake in sending it to Engel, the other operator, three or four hundred yards away. (R. p. 100). He further states the message sent by him to Engel read fifty instead of fifteen. (R. p. 101).

Engel testifies he knew the difference between the symbols for fifteen and fifty, that if it had been sent to him as fifty he would have known the difference between fifty and fifteen. "I swear that I took it down correctly. I took it down fifteen and that is the way it was sent to me." (R. p. 104-105).

Dantoni testifies:

> "The symbols for the word fifty and the word fifteen so far as the "Y" in fifty and "EE" and "N" in fifteen are concerned—are entirely different. The sound is different. I can tell them distinctly. I know I did not make any mistake in sending that message. The message as sent by me read fifty instead of fifteen." (R. page 101).

Engel testifies:

> "There is a difference between the symbol for "EEN" in fifteen and the "Y" in fifty. They are entirely different and any competent operator can tell the difference. I was a competent operator. I took the

message down just as it came over the wire. I took it down exactly as it came. I cannot be mistaken as to that. I wrote it out just as I received it and just as shown on the carbon copy which I have identified." (R. p. 104).

C. C. May, an experienced operator, testified:

"The symbol for the letter "Y" is entirely different from the symbols for "EEN" and a competent operator would know the difference between the symbols for the letter "Y" and the letters "EEN". If a message is sent with the word fifty spelled out and is transmitted over the wire with the apparatus in perfect working condition it would be received as fifty. It would not be received as fifteen. Both instruments would make the same dot at the same time. A man touches the key and that makes an immediate impression of the letter in the receiving office. If fifteen is received the man from whom it is sent would send fifteen over the wire and if fifty was sent over the wire it would be fifty in the receiving office." (R. pp. 107-8).

The message when delivered to Lewis read fifteen cents instead of fifty cents, as originally given and received at Petitioner's main office in New Orleans and as sent through the tube to Dantoni. (R. p. 51). Receiving the message Lewis wired respondent accepting fifteen hundred pounds of the pecans. (R. p. 51).

Respondent, not knowing the message had been changed from fifty to fifteen cents per pound and understanding he was selling them at fifty cents per pound, filled the order with 1006 pounds of pecans. Later he received check from Lewis for $150.90, the price of the pecans at fifteen cents per pound. (R. pp. 51-3.)

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In Western Union Telegraph Company v. Esteve Bros. & Co., 256 U. S., 569, this Court held that, by the Amendment of June 18, 1910, (36 Stat. L. 539), the Interstate Commerce Commission acquired jurisdiction over telegraph companies. It also held (256 U. S. 569) at that time, citing the Primrose case, that the classification of defendant's rates was reasonable in the absence of wilful misconduct or gross negligence.

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> "Gross Negligence" is a relative term. It is doubtless to be understood as meaning a greater want of care than is implied by the term "Ordinary Negligence;" but, after all, it means the absence of the care that was necessary under the circumstances. In this sense the collision was the result of gross negligence, because the employees of the company did not use the

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A higher degree of care at the present time with improved perfected machinery, instruments, equipment, appliances and competent, careful and expert operators is now required of Telegraph Companies than could have been exacted in the early days of telegraphy. 26 R. C. L. 552.

The evident tendency on the part of the Courts is to adopt the principle that it is sufficient to render the Company liable for actual damages if the message shows on its face that it relates to a business transaction and that loss will probably result unless it is promptly and correctly transmitted. 26 R. C. L. 605.

In the case at bar the message disclosed on its face its importance. The amount of damages respondent sustained by changing the message from "fifty" to "fifteen" was thirty-five cents per pound for the pecans. This was a matter of calculation easy to make by either of Petitioner's operators. They were bound to know this damage would result if the message was altered. This required of them a higher degree of care than would have been exacted if the message was in cipher, or the language could not have been understood. Postal Telegraph Cable Co. vs. Nichols, 159 F., 647.

Neither Dantoni nor Engel attempts to explain how the alteration occurred. Each persists in saying he made no mistake. The testimony of one or the other is untrue. Without any explanation as to how the alteration occurred and each positive that he did not alter the message, the presumption is that whoever changed it did it intentionally upon the well known principle that a person is presumed to intend any act committed by him and the consequences resulting therefrom. If they did not use the care necessary to avoid the mistake they were guilty of gross negligence

as defined by this Court in the decisions we have cited. The record fails to affirmatively show this degree of care was exercised.

No decisions have been cited by petitioner showing that this Court has departed from the common law doctrine that a telegraph company cannot by contract exempt itself from liability for gross negligence on the part of its agents and servants, as announced in the Primrose case.

It is insisted that, since the amendment to the Interstate Commerce Act of June 18, 1910, (36 Stat. L. 539), under its tariffs and classifications on file with the Interstate Commerce Commission, Petitioner's liability on account of an error made in the transmission of an unrepeated interstate message was limited to the amount paid for sending the message, regardless of the gross negligence of Petitioner's agents. This would destroy the common law principle announced in the Primrose case that telegraph companies cannot by contract relieve themselves from liability for the gross negligence. This Court has decided to the contrary. Southern Express Co. vs. Byers, 240 U. S., 612.

In the case cited, at page 614 the Court said:

> "Manifestly the shipment was interstate commerce; and under the settled doctrine established by our former opinions rights and liabilities in connection therewith depend upon Acts of Congress, the bills of lading and **common law principles** accepted and enforced by the Federal Courts."

In the instant case the sending of the telegram was interstate commerce. This being true, the principle above announced by this Court is directly applicable.

The different rates, rules and regulations for sending messages as prescribed by the Company were filed with the Interstate Commerce Commission and became effective with the Federal statutes.

> Western Union Tel. Co. vs. Esteve Bros. & Co., 256 U. S. 569.

They were previously held to be reasonable by this Court in the case of **Primrose vs. Western Union Tel. Co.,**

154 U. S. 1, in the absence of wilful misconduct or gross negligence. The law declared in the Primrose case, is quoted with approval in the case of Western Union Tel. Co. vs. Esteve Bros. & Co., 256 U. S. 569. A fair interpretation of this decision, as well as the other decisions of the Federal Courts relied on by respondent, leads to the conclusion that the classification of rates and the limitations upon the telegraph company's liability which were filed with the Interstate Commerce Commission were accepted by the Commission subject to the interpretation placed upon them in the Primrose case. Being so received, these rates and rules and regulations measured the liability of the telegraph company in all cases where there was an absence of wilful misconduct or gross negligence, as declared in the Primrose case. Petitioner can invoke these rates, rules and regulations only in those cases where it was not guilty of wilful misconduct, gross negligence or fraud.

The mere filing of the rates with the Interstate Commerce Commission did not give them any greater force than they had at the time of such filing and did not destroy the judicial interpretation placed upon them by this Court.

Unless the Interstate Commerce statutes expressly provide that these rates and classifications when filed with the Interstate Commerce Commission are the measure of all liability including wilful misconduct and gross negligence, and that the common law as declared by this Court, which awards damages for wilful misconduct, or gross negligence, has been repealed, the decision in the Primrose case governs.

> "It is not to be presumed that the legislature intended to abrogate or modify a rule of the common law by the enactment of a statute upon the same subject; it is rather to be presumed that no change in the common law was intended, unless the language employed clearly indicates such intention."

clearly indicates such intention." 25 R. C. L., page 1054.

It is also well settled that statutes in derogation of the common law are to be strictly construed. 25 R. C. L., page 1056.

In the case of Western Union Telegraph Co. vs. Czizek, 264 U. S. 281, the United States Circuit Court of Appeals held the telegraph company under the facts was guilty of gross negligence. This Court held under the facts that it was not guilty of gross negligence and was therefore protected by the rules and regulations. No other question was decided. This case is not in point. The other expressions in the opinion relied on by Petitioner were dictum.

The rules and regulations of Petitioner limiting its liability for damages for transmission of unrepeated messages to the amount of the toll paid and to not exceeding Fifty Dollars were unreasonable and not binding on respondent.

By the amendment of June 18, 1910 (36 Stat. L. 539) to the Interstate Commerce Act, the Interstate Commerce Commission was given jurisdiction over the rates and practices of Interstate Telegraph Companies, as well as the rules, regulations, conditions and restrictions affecting their interstate rates. This conferred upon the Commission the power to pass upon the reasonableness of the rules and regulations of Telegraph Companies. Cultra & Cultra, Trading as Clay County Produce Co. vs. Western Union Telegraph Co., Case No. 8917, 44 I. C. C., 670.

While, as above shown, this power has no application in cases of gross negligence, the statute conferred upon the Interstate Commerce Commission power to declare whether the rules prescribing the damages recoverable in unrepeated message cases were reasonable or unreasonable. Without an investigation of the facts and practices of the Telegraph Company upon which the rule was based, this Court held in the Primrose case and also in the Esteve Bros. Co. case, 256 U. S. 566, that the rule was reasonable.

The unrepeated message case, No. 8917, of Cultra & Cultra, trading as Clay County Produce Co., vs. Western Union Telegraph Co., was decided May 17, 1917. 44 I. C. C., 670. At that time the Interstate Commerce Commission held that the rules governing damages as to unrepeated messages had not been shown to be unreasonable or other-

wise unlawful. 44 I. C. C., 670.

It appears that the Commission was not satisfied with its decision. Referring to this as the "Unrepeated Message Case" the Interstate Commerce Commission, in cases No. 11524 and Unrepeated Message Case No. 8917, Cultra & Cultra, Trading as Clay County Produce Co. vs. Western Union Telegraph Co., 61 I. C. C. page 541, said:

> "In order that we might be informed whether the general practice of the Western Union, defendant in the Unrepeated Message Case, was in conformity with its published rules and also to obtain further information relative to the reasonableness of the rules, that proceeding was set down for further hearing. Further hearing was had on February 20, 1918."

It appears that on August 1, 1918, the President assumed control of the defendant company and it remained in the hands of the Government until August 1, 1919. For this reason the consideration of the evidence taken at the hearing of February 20, 1918, was held in abeyance. Thereafter, on March 1, 1920, a further hearing was had to ascertain whether changes had been made in the practices of the Company since the former hearing and to afford an opportunity to parties interested to present new facts bearing on the propriety of the rules.

It further appears from the decision above referred to that, although the Western Union Telegraph Co. had promulgated the rule limiting liability for damages in cases of unrepeated messages to the amount of toll paid for the message, its practice for a long number of years had been to pay the actual damages sustained and that the Company availed itself of the rule only in those cases where the claim was without foundation, or was unusually large.

It further appears from the opinion that prior to 1910 the rule was never observed and all claims for damages were referred to and dealt with by the Legal Department without reference to limited liability.

In 1913, after the amendment, claims were settled according to the discretion of the superintendents, or mana-

gers. Since then adherence to contractual limitations was not required and the restricted-liability provisions were not resorted to in the case of meritorious claims which were reasonable in amount.

Referring to the practice of the Company settling meritorious claims, the Commission said:

> "That practice as heretofore stated, contemplates full payment of claims by general superintendents, or general managers, up to $500.00, without submission to the Legal Department and without reference to the contractual defenses."

In summing up the Commission said:

> "Upon consideration of the record we find that the present rules of the respondents restricting their liability for negligence in the transmission or delivery, or for non delivery, of unrepeated and repeated interstate messages are, and for the future will be, unreasonable." 61 I. C. C., 541.

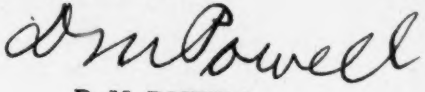
In the same opinion the Commission fixed the maximum liability in cases of unrepeated messages at $500.00. The message in the case at bar was sent December 16, 1919. Unrepeated Message Case No. 8917 was first decided May 17, 1917. 44 I. C. C., 670. The case was continued for further consideration and was pending at the time respondent's message was sent. If the rule was unreasonable in the Unrepeated Message Case, which was pending at the time respondent's message was sent, it was also unreasonable in respondent's case.

No matter of right authorizing the exercise of sound judicial discretion in Petitioner's behalf is here involved. The damages claimed by Respondent were less than five hundred dollars. Under the rulings and orders of the Interstate Commerce Comission the questions here involved, the amount in controversy being less than five hundred dollars, cannot arise in the future. Morally and legally the petition is without merit. Respondent's claim was small, but meritorious. Petitioner deserves no credit for its persistent efforts to defeat it. It has delayed payment more

than seven years, has put Respondent to the annoyance and expense of three jury trials, as well as three appeals, and now is forcing him to the further expense of defending his claim before the highest Court of the Nation.

We respectfully insist the petition should be denied.

Respectfully submitted.



D. M. POWELL,
Attorney for Respondent

POWELL & HAMILTON,
of Greenville, Alabama,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1926-27

WESTERN UNION TELEGRAPH COMPANY,
Petitioner

v.

C. H. PRIESTER,
Respondent.

BRIEF OF RESPONDENT ON PETITION FOR CERTIORARI TO THE SUPREME COURT OF ALABAMA.

Official Reports of Opinion Delivered in the Courts Below:

W. U. Tel. Co. v. Priester, 18 Ala. App. 531, 93 So. 231;
Priester v. W. U. Tel. Co., 20 Ala. App. 388; 102 So. 372;
Ex parte Priester, 212 Ala. 271; 102 So. 376;
W. U. Tel. Co. v. Priester, 111 So. 199. (Advance Sheet).

GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS DENIED.

1. The action in the State Court was to recover damages for Petitioner's gross negligence in changing a telegram delivered to it at Greenville, Alabama, by respondent for transmission to J. K. Lewis, New Orleans, Louisiana, offering one thousand to fifteen hundred pounds of pecans for sale at fifty cents per pound, so as to read fifteen cents per

pound when delivered, causing an actual loss to respondent of $352.10, besides interest. In holding petitioner liable for gross negligence the decision of the State Courts is in accord with applicable decisions of this Court.

Petitioner's tariffs and classifications on file with the Inter-State Commerce Commission under the amendment to the Inter-State Commerce Act of June 18, 1910 (36 Stat. L. 539) did not authorize petitioner to contract against its gross negligence.

2. The rules and regulations of petitioner limiting its liability for damages for negligence in transmission of unrepeated messages to the amount of the toll paid were unreasonable and not binding on petitioner.

3. Cases believed to sustain resopndent's contention:

Milwaukee & St. Paul Rly. Co. vs. Arms, et al, 91 U. S. 489;
Postal Teleg. Co. vs. Nichols, 159 F. 643;
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25 R. C. L., 1054 and 1056;
26 R. C. L., 551-2 and 605;
Unrepeated Message Cases, 8917 and 11524, 61 I. C. C. 541.

STATEMENT OF THE CASE

Respondent, through Southern Bell Telephone and Telegraph Company's office at Fort Deposit, phoned Petitioner's operator at Greenville, Alabama, for transmission to J.

K. Lewis Wholesale Produce Co., 411 Poydras Street, New Orleans, La., the following message:

> "Offer you thousand or fifteen hundred pounds Frotcher's pecans at fifty cents, f. o. b. Ft. Deposit. Answer. C. H. Priester." (R. pp. 49, 50 and 55)

It was correctly transmitted to petitioner's main office in New Orleans. From the main office it was sent by underground tube to Petitioner's operator, Dantoni, at its Cotton Exchange Branch in New Orleans. Dantoni wired it to Petitioner's operator, Engel, at its Board of Trade Office in New Orleans. (R. pp. 97-99)

Petitioner's operator, Dantoni, testified that when the message reached him through the tube it read fifty cents, that it went from Greenville to New Orleans, a distance of three hundred miles, alright, that the message was right before him and he knows he made no mistake in sending it to Engel, the other operator, three or four hundred yards away. (R. p. 100). He further states the message sent by him to Engel read fifty instead of fifteen. (R. p. 101).

Engel testifies he knew the difference between the symbols for fifteen and fifty, that if it had been sent to him as fifty he would have known the difference between fifty and fifteen. "I swear that I took it down correctly. I took it down fifteen and that is the way it was sent to me." (R. p. 104-105).

Dantoni testifies:

> "The symbols for the word fifty and the word fifteen so far as the "Y" in fifty and "EE" and "N" in fifteen are concerned—are entirely different. The sound is different. I can tell them distinctly. I know I did not make any mistake in sending that message. The message as sent by me read fifty instead of fifteen." (R. page 101).

Engel testifies:

> "There is a difference between the symbol for "EEN" in fifteen and the "Y" in fifty. They are entirely different and any competent operator can tell the difference. I was a competent operator. I took the

message down just as it came over the wire. I took it down exactly as it came. I cannot be mistaken as to that. I wrote it out just as I received it and just as shown on the carbon copy which I have identified." (R. p. 104).

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> Western Union Tel. Co. vs. Esteve Bros. & Co., 256 U. S. 569.

They were previously held to be reasonable by this Court in the case of **Primrose vs. Western Union Tel. Co.,**

154 U. S. 1, in the absence of wilful misconduct or gross negligence. The law declared in the Primrose case, is quoted with approval in the case of Western Union Tel. Co. vs. Esteve Bros. & Co., 256 U. S. 569. A fair interpretation of this decision, as well as the other decisions of the Federal Courts relied on by respondent, leads to the conclusion that the classification of rates and the limitations upon the telegraph company's liability which were filed with the Interstate Commerce Commission were accepted by the Commission subject to the interpretation placed upon them in the Primrose case. Being so received, these rates and rules and regulations measured the liability of the telegraph company in all cases where there was an absence of wilful misconduct or **gross negligence,** as declared in the Primrose case. Petitioner can invoke these rates, rules and regulations only in those cases where it was not guilty of wilful misconduct, **gross negligence** or fraud.

The mere filing of the rates with the Interstate Commerce Commission did not give them any greater force than they had at the time of such filing and did not destroy the judicial interpretation placed upon them by this Court.

Unless the Interstate Commerce statutes expressly provide that these rates and classifications when filed with the Interstate Commerce Commission are the measure of all liability including wilful misconduct and gross negligence, and that the common law as declared by this Court, which awards damages for wilful misconduct, or gross negligence, has been repealed, the decision in the Primrose case governs.

> "It is not to be presumed that the legislature intended to abrogate or modify a rule of the common law by the enactment of a statute upon the same subject; it is rather to be presumed that no change in the common law was intended, unless the language employed clearly indicates such intention."
>
> clearly indicates such intention." 25 R. C. L., page 1054.

It is also well settled that statutes in derogation of the common law are to be strictly construed. 25 R. C. L., page 1056.

In the case of Western Union Telegraph Co. vs. Czizek, 264 U. S. 281, the United States Circuit Court of Appeals held the telegraph company under the facts was guilty of gross negligence. This Court held under the facts that it was not guilty of gross negligence and was therefore protected by the rules and regulations. No other question was decided. This case is not in point. The other expressions in the opinion relied on by Petitioner were dictum.

The rules and regulations of Petitioner limiting its liability for damages for transmission of unrepeated messages to the amount of the toll paid and to not exceeding Fifty Dollars were unreasonable and not binding on respondent.

By the amendment of June 18, 1910 (36 Stat. L. 539) to the Interstate Commerce Act, the Interstate Commerce Commission was given jurisdiction over the rates and practices of Interstate Telegraph Companies, as well as the rules, regulations, conditions and restrictions affecting their interstate rates. This conferred upon the Commission the power to pass upon the reasonableness of the rules and regulations of Telegraph Companies. Cultra & Cultra, Trading as Clay County Produce Co. vs. Western Union Telegraph Co., Case No. 8917, 44 I. C. C., 670.

While, as above shown, this power has no application in cases of gross negligence, the statute conferred upon the Interstate Commerce Commission power to declare whether the rules prescribing the damages recoverable in unrepeated message cases were reasonable or unreasonable. Without an investigation of the facts and practices of the Telegraph Company upon which the rule was based, this Court held in the Primrose case and also in the Esteve Bros. Co. case, 256 U. S. 566, that the rule was reasonable.

The unrepeated message case, No. 8917, of Cultra & Cultra, trading as Clay County Produce Co., vs. Western Union Telegraph Co., was decided May 17, 1917. 44 I. C. C., 670. At that time the Interstate Commerce Commission held that the rules governing damages as to unrepeated messages had not been shown to be unreasonable or other-

wise unlawful. 44 I. C. C., 670.

It appears that the Commission was not satisfied with its decision. Referring to this as the "Unrepeated Message Case" the Interstate Commerce Commission, in cases No. 11524 and Unrepeated Message Case No. 8917, Cultra & Cultra, Trading as Clay County Produce Co. vs. Western Union Telegraph Co., 61 I. C. C. page 541, said:

> "In order that we might be informed whether the general practice of the Western Union, defendant in the Unrepeated Message Case, was in conformity with its published rules and also to obtain further information relative to the reasonableness of the rules, that proceeding was set down for further hearing. Further hearing was had on February 20, 1918."

It appears that on August 1, 1918, the President assumed control of the defendant company and it remained in the hands of the Government until August 1, 1919. For this reason the consideration of the evidence taken at the hearing of February 20, 1918, was held in abeyance. Thereafter, on March 1, 1920, a further hearing was had to ascertain whether changes had been made in the practices of the Company since the former hearing and to afford an opportunity to parties interested to present new facts bearing on the propriety of the rules.

It further appears from the decision above referred to that, although the Western Union Telegraph Co. had promulgated the rule limiting liability for damages in cases of unrepeated messages to the amount of toll paid for the message, its practice for a long number of years had been to pay the actual damages sustained and that the Company availed itself of the rule only in those cases where the claim was without foundation, or was unusually large.

It further appears from the opinion that prior to 1910 the rule was never observed and all claims for damages were referred to and dealt with by the Legal Department without reference to limited liability.

In 1913, after the amendment, claims were settled according to the discretion of the superintendents, or mana-

gers. Since then adherence to contractual limitations was not required and the restricted-liability provisions were not resorted to in the case of meritorious claims which were reasonable in amount.

Referring to the practice of the Company settling meritorious claims, the Commission said:

> "That practice as heretofore stated, contemplates full payment of claims by general superintendents, or general managers, up to $500.00, without submission to the Legal Department and without reference to the contractual defenses."

In summing up the Commission said:

> "Upon consideration of the record we find that the present rules of the respondents restricting their liability for negligence in the transmission or delivery, or for non delivery, of unrepeated and repeated interstate messages are, and for the future will be, unreasonable." 61 I. C. C., 541.

In the same opinion the Commission fixed the maximum liability in cases of unrepeated messages at $500.00. The message in the case at bar was sent December 16, 1919. Unrepeated Message Case No. 8917 was first decided May 17, 1917. 44 I. C. C., 670. The case was continued for further consideration and was pending at the time respondent's message was sent. If the rule was unreasonable in the Unrepeated Message Case, which was pending at the time respondent's message was sent, it was also unreasonable in respondent's case.

No matter of right authorizing the exercise of sound judicial discretion in Petitioner's behalf is here involved. The damages claimed by Respondent were less than five hundred dollars. Under the rulings and orders of the Interstate Commerce Comission the questions here involved, the amount in controversy being less than five hundred dollars, cannot arise in the future. Morally and legally the petition is without merit. Respondent's claim was small, but meritorious. Petitioner deserves no credit for its persistent efforts to defeat it. It has delayed payment more

than seven years, has put Respondent to the annoyance and expense of three jury trials, as well as three appeals, and now is forcing him to the further expense of defending his claim before the highest Court of the Nation.

We respectfully insist the petition should be denied.

Respectfully submitted.

D. M. POWELL,
Attorney for Respondent

POWELL & HAMILTON,
of Greenville, Alabama,
Of Counsel.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1927.
No. 916.

WESTERN UNION TELEGRAPH COMPANY,
Petitioner

vs.

C. H. PRIESTER.

On Writ of Certiorari to the Court of Appeals of the State of Alabama. Petition for Certiorari filed February 21, 1927. Certiorari granted April 18, 1927.

No. 958.
WESTERN UNION TELEGRAPH COMPANY,
Petitioner

vs.

C. H. PRIESTER.

On Writ of Certiorari to the Supreme Court of the State of Alabama. Petition for Certiorari filed March 7, 1927. Certiorari granted April 18, 1927.

BRIEF OF D. M. POWELL,
FOR RESPONDENT.
(32,483)
(32,545)

OFFICIAL REPORTS OF THE OPINIONS DELIVERED IN THE COURTS BELOW.

Western Union Telegraph Company v. Priester, 18 Ala. App. 531, 93 So. 231;
Priester v. Western Union Telegraph Company, 20 Ala. App. 388, 102 So. 372;
Ex parte Priester, 212 Ala. 271, 102 So. 376;
Western Union Telegraph Company v. Priester, 21 Ala. App. 587, 111 So. 199;
Western Union Telegraph Company v. Priester, 215 Ala. 435, 111 So. 200.

GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS DENIED.

Petitioner invokes the jurisdiction of this Court under the Amendment to the Interstate Commerce Act of June 18, 1910 (36 Stat. L. 539) and Petitioner's rules and regulations limiting its liability in damages for negligence in the transmission of unrepeated messages to the amount of the toll paid, filed with the Interstate Commerce Commission under said Act. This Act and Petitioner's rules and regulations do not apply because

(a) The action in the State Court was for gross negligence.

(b) Petitioner's rules and regulations limiting its liability were unreasonable where, as in Respondent's case, the amount of damages claimed was less than $500.00.

CASES BELIEVED TO SUSTAIN RESPONDENT'S CONTENTION.

Milwaukee & St. Paul Railway Company v. Arms, et al., 91 U. S. 489;
Postal Telegraph Company v. Nichols, 159 F. 643;
Preston v. Prather, 137 U. S. 604;
Priester Exparte v. Western Union Telegrapm Company, 212 Ala. 271, 102 So. 376.
Primrose v. Western Union Telegraph Company, 154 U. S. 1;

Redington v. Pacific Postal Telegraph Company, 48 Am. St. Rep. 132;
Southern Express Company v. Byers, 240 U. S. 612;
Strong v. Western Union Telegraph Company, 30 L. R. A. (N. S.) 418;
Telegraph Company v. Griswold, 37 Ohio St. 301, 41 Am. Rep. 500, 506;
Unrepeated Message Cases, 8917 and 11524, 61 I. C. C. 541;
White, et al. v. Western Union Telegraph Company, 14 F. 710;
Western Union Telegraph Company v. Crall, 38 Kan. 679;
Western Union Telegraph Company v. Esteve Bros. Co., 256 U. S. 566;
Western Union Telegraph Company v. Goodbar, et al., 7 Southern 214;
Western Union Telegraph Company v. Howell. 38 Kan. 685;
25 Ruling Case Law, pp. 1054 and 1056;
25 Ruling Case Law, Section 297, p. 1075;
26 Ruling Case Law, pp. 551-2 and 605.

STATEMENT OF THE CASE.

Respondent, through Southern Bell Telephone and Telegraph Company's office at Fort Deposit, phoned Petitioner's operator at Greenville, Alabama, for transmission to J. K. Lewis Wholesale Produce Co., 411 Poydras Street, New Orleans, La., the following message:

> "Offer you thousand or fifteen hundred pounds Frotcher's pecans at fifty cents, f. o. b. Ft. Deposit. Answer. C. H. Priester." (R. pp. 49, 50 and 55).

It was correctly transmitted to petitioner's main office in New Orleans. From the main office it was sent by underground tube to Petitioner's operator, Dantoni, at its Cotton Exchange Branch in New Orleans. Dantoni wired it to Petitioner's operator, Engel, at its Board of Trade Office in New Orleans. (R. pp. 97-99).

Petitioner's operator, Dantoni, testified that when the message reached him through the tube it read fifty cents, that it

went from Greenville to New Orleans, a distance of three hundred miles, alright, that the message was right before him and he knows he made no mistake in sending it to Engel, the other operator, three of four hundred yards away. (R. p. 100). He further states the message sent by him to Engel read fifty instead of fifteen. (R. p. 101).

Dantoni testifies:

"The symbols for the word fifty and the word fifteen so far as the 'Y' in fifty and 'EE' and 'N' in fifteen are concerned—are entirely different. The sound is different. I can tell them distinctly. I know I did not make any mistake in sending that message. The message as sent by me read fifty instead of fifteen." (R. p. 101).

Engel testifies:

"There is a difference between the symbol for 'EEN' in fifteen and the 'Y' in fifty. They are entirely different and any competent operator can tell the difference. I was a competent operator. I took the message down just as it came over the wire. I took it down exactly as it came. I cannot be mistaken as to that. I wrote it out just as I received it and just as shown on the carbon copy which I have identified." (R. p. 104).

"I sent this message out just like I took it down. The copy shows fifteen, and it was sent out that way. If the message had been sent to me over the wire as fifty I would have known the difference between fifty and fifteen. I swear that I took it down correctly. I took it down fifteen and that is the way it was sent to me." (R. p. 105.)

C. C. May, an experienced operator ,testified:

"The symbol for the letter 'Y' is entirely different from the symbols for 'EEN' and a competent operator would know the difference between the symbols for the letter 'Y' and the letters 'EEN.' If a message is sent with the word fifty spelled out and is transmitted over the wire with the apparatus in perfect working condition it would be received as fifty. It would not be received as fifteen. Both instruments would make the same dot at the same time. A man touches the key and that makes an immediate imperssion of the letter in the receiving office. If

fifteen is received the man from whom it is sent would send fifteen over the wire and if fifty was sent over the wire it would be fifty in the receiving office." (R. pp. 107-8).

The message when delivered to Lewis read fifteen cents instead of fifty cents, as originally given and received at Petitioner's main office in New Orleans and as sent through the tube to Dantoni. (R. p. 51). Receiving the message Lewis wired respondent accepting fifteen hundred pounds of the pecans. (R. p. 51).

Respondent, not knowing the message had been changed from fifty to fifteen cents per pound and understanding he was selling them at fifty cents per pound, filled the order with 1006 pounds of pecans. Later he received check from Lewis for $150.90, the price of the pecans at fifteen cents per pound. (R. pp. 51-3).

Respondent's testimony shows the pecans were worth on the market, F. O. B. cars at Ft. Deposit, fifty cents per pound at the time the telegram was sent. His actual loss was thirty-five cents per pound, or $352.10. (R. p. 53).

Judgment for the Respondent was rendered September 29, 1925, for $514.07. (R. pp. 44-5). This, under the instruction of the Court, included interest from December 16, 1919. (R. p. 38).

The case was tried on counts 6 and 7 of the complaint, claiming Petitioner was guilty of gross negligence. (R. pp. 20-21).

SUMMARY.

1.

Respondent's case against Petitioner was for gross negligence in changing a telegram given it for transmission so as to make the offer of Respondent for the sale of his pecans to Lewis read **fifteen** cents per pound instead of **fifty** cents. The action being for gross negligence, the Amendment to the Interstate Commerce Act of June 18, 1910 (36 Stat. L. 539). extending the provisions of that Act to telegraph companies, does not apply.

2.

The regulation of petitioner limiting its liability for negligence and mistakes in the transmission of unrepeated messages to the toll paid therefor under the Amendment to the Interstate Commerce Act of June 18, 1910 (36 Stat. 1. 539), in cases where the amount of damages sustained was less than $500.00, was unreasonable and not binding on Respondent. This being true, Respondent was entitled to recover the damages actually sustained, the amount claimed being only $352.10.

ARGUMENT.

1.

This Court clearly lays down the proposition that the rules of the Telegraph Company relieving it from Liability beyond the cost of sending the unrepeated message do not apply where the Company is guilty of wilful wrong or gross negligence.

Primrose v. W. U. Teleg. Co., 154 U. S. pp. 18 and 19.

In Western Union Telegraph Company v. Esteve Bros. & Co., 256 U. S., 569, this Court held that, by the Amendment of June 18, 1910 (36 Stat. L. 539), the Interstate Commerce Commission acquired jurisdiction over telegraph companies. It also held (256 U. S. 569) at that time, citing the Primrose case, that the classification of defendant's rates was reasonable, in the absence of wilful misconduct or gross negligence.

In Milwaukee, etc., R. R. Co. v. Arms, et al., 91 U. S. 495, the Court defined gross negligence as follows:

> "'Gross Negligence' is a relative term. It is doubtless to be understood as meaning a greater want of care than is implied by the term 'Ordinary Negligence'; but, after all, it means the absence of the care that was necessary under the circumstances. In this sense the collision was the result of gross negligence, because the employees of the company did not use the care that was required to avoid the accident."

Announcing the general doctrine that gratuitous bailees of another's property are not responsible for its loss unless guilty of gross negligence in its keeping, this Court, in the case of Preston v. Prather, 137 U. S. 608-9, said:

> "But gross negligence in such cases is nothing more than a failure to bestow the care which the property in its situation demands; the omission of the reasonable care required is the negligence which creates the liability; and whether this existed is a question of fact for the jury to determine, or by the court where a jury is waived."

Gross negligence was not defined in the Primrose case, 154 U. S. 1, but we assume the Court must have had in mind the definition given in the Arms and Preston cases above cited. Be that as it may, the doctrine of gross negligence has been applied by both State and Federal Courts to cases where the facts were similar to the facts in this case.

Following the above and other decisions of this Court, the Supreme Court of Alabama held that telegraph company's "failure to evercise that degree of care which the situation—its regulation included—demanded was gross negligence against which it could not contract."

Ex parte Priester, 212 Ala. 273.

In the well considered case of Strong v. Western Union Telegraph Co., 30 L. R. A. (N. S.) 418, the Court said:

> "In certain cases 'gross negligence' is evidently deemed the equivalent in legal contemplation of 'ordinary negligence.' In many cases, however, 'gross negligence' is used to denote a degree of carelessness greater than the degre implied by 'ordinary carelessness', and one of which the law takes distinct legal cognizance. It is thus used in those cases in which telegraph companies are permitted to limit their liability for losses, occurring through their ordinary carelessness, but at the same time are not permitted to limit their liability for losses occurring through their gross negligence."

In Postal Telegraph Cable Co. v. Nichols, 159 F., page 647, (unrepeated message), the Court held the Company was guilty of gross neglect on its part against which it could not contract.

In White v. Western Union Telegraph Co., 14 F., page 710, the words "fifty July wheat" were substituted for "fifteen July wheat."

The Court charged the jury if the mistake was through the gross negligence of the defendant, or its agents, and plaintif suffered damage, defendant would be responsible, although the message was not repeated, or its correct transmission insured.

In Redington v. Pacific Postal Telegraph Company, 48 Am. St. Rep., 132 (unrepeated message), the word "nineteen" in the original message was changed to read "nine" when it was delivered, causing the amount of the attachment to be levied to read $903.00 instead of $1903.00. In line with the Federal cases we have cited, the Court held the question of gross negligence was one for the jury and refused to disturb a verdict for damages against the telegraph company.

In the case of Western Union Telegraph Company v. Goodbar, et al., 7 Southern 214, the message sent from Goodbar & Company to Stephens read as follows:

> "Cooper & Bone owe us account not due, six hundred and sixty-three dollars. Cooper & Hodges account past due, two hundred and five dollars. Attach or otherwise secure claims. See George S. Mitchell for bond. Answer." As delivered to Stephens the telegram read as follows:
>
> "Cooper & Bone owe us account not due, hundred and sixty-three dollars. Cooper & Hodges account past due, two hundred and five dollars. Attach or otherwise secure claims. See George S. Mitchell for bond."

It will be seen that the message was so altered in the transmission as to read **"hundred** and sixty-three dollars" instead of **"six hundred** and sixty-three dollars", as contained in the original message. There were other mistakes evidencing carelessness. The Supreme Court of Mississippi held that the defendant company wah guilty of gross negligence, that the verdict of the jury awarding the damages was supported by the testimony, and affirmed the judgment of the lower court.

Other cases directly in point are Western Union Telegraph Co. v. Crall, 38 Kan., p. 679, and Western Union Telegraph Co. v. Howell, 38 Kan., p. 685.

A higher degree of care at the present time with improved perfected machinery, instruments, equipment, appliances and competent ,careful and expert operators is now required of telegraph companies than could have been exacted in the early days of telegraphy.—26 R. C. L. 552.

The evident tendency on the part of the Courts is to adopt the principle that it is sufficient to render the company liable for actual damages if the message shows on its face that it relates to a business transaction and that loss will probably result unless it is promptly and correctly transmitted.—26 R. C. L. 605.

In the case at bar the message disclosed on its face its importance. The amount of damages respondent sustained by changing the message from "fifty" to "fifteen" was thirty-five cents per pound for the pecans. This was a matter of calculation easy to make by either of Petitioner's operators. They were bound to know this damage would result if the message was altered. This required of them a higher degree of care than would have been exacted if the message was in cipher, or the language could not have been understood. Postal Telegraph Cable Co. v. Nichols, 159 F. 647.

Neither Dantoni nor Engel attempts to explain how the alteration occurred. Each persists in saying he made no mistake. The testimony of one or the other is untrue. Without any explanation as to how the alteration occurred and each positive that he did not alter the message, the presumption is that whoever changed it did it intentionally upon the well known principle that a person is presumed to intend any act committed by him and the consequences resulting therefrom. If they did not use the care necessary to avoid the mistake they were guilty of gross negligence as defined by this Court in the decisions we have cited. The record fails to affirmatively show this degree of care was exercised.

In Primrose v. W. U. Tel. Co., 154 U. S. pp. 18 and 19, Mr. Justice Grey quotes with approval from 78 Penn. St. 238, as follows:

> "By no device can a body corporate avoid liability for fraud, for wilful wrong or for the gross negligence, which if it does not intend to occasion injury, is reckless of con-

sequences and transcends the bounds of right with full knowledge that mischief may ensue."

The message received by Dantoni thru the tube reads fifty cents. It was right before him when he wired it to Engel three hundred yards away. (R. p. 101.) He had full knowledge that mischief might ensue if he changed it to fifteen. If he wired it to Engel reading fifty, then Engel had full knowledge that mischief might ensue, if he sent it to Lewis reading fifteen instead of fifty. One of these men changed the message so as to read fifteen instead of fifty. The guilty one had full knowledge that mischief might ensue from the change. Possessing this knowledge, he could not have made the change without a reckless disregard of consequences and transcending the bounds of right. The State Court was fully justified under the testimony in submitting the question of gross negligence to the jury.

The message was relayed from Greenville to Atlanta and from there to the main office in New Orleans, more than seven hundred miles without mistake. (R. p. 102.) The distance from Dantoni's to Engel's office was only three hundred yards. They were experienced and competent operators. Their instruments were the best in use and in perfect condition. (R. 99 and 106.) It is not claimed there was anything wrong with the wires. One of these men changed the message. Under the facts disclosed he could not have done so without being guilty of gross negligence.

No decisions have been cited by Petitioner showing that this Court has departed from the common law doctrine that a telegraph company cannot by contract exempt itself from liability for gross negligence on the part of its agents and servants, as announced in the Primrose case.

It is insisted that, since the Amendment to the Interstate Commerce Act of June 18, 1910 (36 Stat. L. 539), under its tariffs and classifications on file with the Interstate Commerce Commission, Petitioner's liability on account of an error made in the transmission of an unrepeated interstate message was limited to the amount paid for sending the message. regardless of the gross negligence of Petitioner's agents. This would destroy the common law principle announced in the Primrose case that telegraph companies cannot by contract

relieve themselves from liability for their gross negligence. This Court has decided to the contrary. Southern Express Co. v. Byers, 240 U. S. 612.

In the case cited, at page 614, the Court said:

> "Manifestly the shipment was interstate commerce; and under the settled doctrine established by our former opinions rights and liabilities in connection therewith depend upon acts of Congress, the bills of lading and common law principles accepted and enforced by the Federal Courts."

In the instant case the sending of the telegram was interstate commerce. This being true, the principle above announced by this Court is directly applicable.

The different rates, rules and regulations for sending messages as prescribed by the company were filed with the Interstate Commerce Commission and became effective with the Federal statutes.

Western Union Tel. Co. v. Esteve Bros. & Co., 256 U. S. 569.

They were previously held to be reasonable by this court in the case of **Primrose v. Western Union Tel. Co., 154 U. S. 1, in the absence of wilful misconduct or gross negligence.** The law declared in the Primrose case, is quoted with approval in the case of Western Union Tel. Co. v. Esteve Bros. & Co., 256 U. S. 569. A fair interpretation of this decision, as well as the other decisions of the Federal Courts relied on by Respondent, leads to the conclusion that the classification of rates and the limitations upon the telegraph company's liability which were filed with the Interstate Commerce Commission were accepted by the Commission subject to the interpretation placed upon them in the Primrose case. Being so received, these rates and rules and regulations measured the liability of the telegraph company in all cases where there was an absence of wilful misconduct or gross negligence, as declared in the Primrose case. Petitioner can invoke these rates, rules and regulations only in those cases where it was not guilty of wilful misconduct, gross negligence or fraud.

The mere filing of the rates with the Inerstate Commerce Commission did not give them any greater force than they

had at the time of such filing and did not destroy the judicial interpretaiton placed upon them by this Court.

Unless the Interstate Commerce statutes expressly provide that these rates and classifications when filed with the Interstate Commerce Commission are the measure of all liability including wilful misconduct and gross negligence, and that the common law as declared by this Court, which awards damages for wilful misconduct, or gross negligence, has been repealed, the decision in the Primrose case governs.

> "It is not to be presumed that the legislature intended to abrogate or modify a rule of the common law by the enactment of a statute upon the same subject; it is rather to be presumed that no change in the common law was intended, unless the language employed clearly indicates such intention." 25 R. C. L., p. 1054.

It is also well settled that statutes in derogation of the common law are to be strictly construed.—25 R. C. L., p. 1056.

At the time of the passage of the Amendment to the Interstate Commerce Act of June 18, 1910 (36 Stat. L. 539) this Court, in the Primrose case, 154 U. S. 1, had judicially construed the regulation of the Western Union Telegraph Company limiting its liability for negligence in sending unrepeated messages to the amount of the toll paid, holding that this regulation was reasonable in the absence of wilful misconduct or **gross negligence.** This being true, the judicial construction of the regulation in the Primrose case was embodied in and became a part of the statute enacted June 18, 1910. The principle here invoked is analogous to the enactment of a statute which has received judicial construction.

> "It is a settled rule of statutory construction that when a statute or a clause or provision thereof has been construed by the court of last resort, of a State, and the same is substantially reenacted, the Legislature adopts such construction, unless the contrary is clearly shown by the language of the Act or the rules of statutory construction have been changed."—25 R. C. L., Sec. 297, p. 1075.

In the case of Western Union Telegraph Co. v. Czizek, 286F. 478, the United States Circuit Courts of Appeals held the telegraph company under the facts was guilty of gross

negligence. This Court held under the facts that it was not guilty of gross negligence and was therefore protected by the rules and regulations. No other question was decided. This case is not in point. The other expressions in the opinion relied on my Petitioner were dicta.—Western Union Tel. Co. v. Czizek, 264 U. S. 281.

The only special defense interposed by Petitioner in the State Court was that by the passage of the Amendment of June 18, 1910 (36 Stat. L. 539) to the Interstate Commerce Act, the Interstate Commerce Commission was given jurisdiction over the rates and practices of interstate telegraph companies, and that by reason of this fact Respondent was not entitled to recover for the gross negligence of the telegraph company because the regulations limited the liability in all cases, including gross negligence, to the toll paid for sending the message. It being shown that this defense does not apply to cases where the telegraph company is guilty of gross negligence, it follows that the matters set up in the special defense were no answer to the action for gross negligence and that the State Court correctly held that the demurrer on this ground was good and properly disallowed the plea. The only other plea in the case was the general issue. This, of course, did not raise a Federal question.

2.

The Amendment of June 8, 1910 (36 Stat. L. 539) to the Interstate Commerce Act contains the following provision:

> "All charges made for any service rendered or to be rendered in the transportation of passengers or property and for the transmission of messages by telegraph, telephone, or cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."—36 Stat. L. 545.

The Act also contains the following provision:

> "that messages by telegraph, telephone or cable, subject to the provisions of this Act, may be classified into day, night, repeated, unrepeated, letter, commercial,

press, government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages."—36 Stat. L. 545, 546.

The Courts have held that the right above conferred on telegraph companies carried with it authority to adopt reasonable rules and regulations relating to the classification and sending of messages. Where such rules and regulations were reasonable they were of course binding. But from the very language of the statute, where the rules and regulations were unreasonable, they were of course not binding.

In the absence of facts showing the contrary this Court, in the Primrose case, 154 U. S. 1, held that the regulation of the Western Union Telegraph Company limiting its liability for damages to the amount of the toll paid for negligence in sending an unrepeated message was reasonable. Had it been disclosed that in cases where the amount of damages was less than $500.00 it was the rule and practice of the telegraph company to settle the damages actually sustained, regardless of the printed regulations, we feel safe in saying this Court would never have held that the regulation was reasonable. To have done so would have allowed the company to take advantage of its own wrong and invoke a regulation which was never applied, except in cases without merit.

Without an investigation of the facts and practices of the telegraph company upon which the rule was based, this Court held, in the Esteve Bros. & Co. case, 256 U. S. 566, that the rule was reasonable.

The unrepeated message case, No. 8917, of Cultra & Cultra, trading as Clay County Produce Co., vs. Western Union Telegraph Co., was decided May 17, 1917. 44 I. C. C. 670. At that time the Interstate Commerce Commission held that the rules governing damages as to unrepeated messages had not been shown to be unreasonable or otherwise unlawful.—44 I. C. C. 670.

It appears that the Commission was not satisfied with its decision. Referring to this as the "Unrepeated Message Case" the Interstate Commerce Commission, in cases No. 11524 and Unrepeated Message Case No. 8917, Cultra & Cultra, Trading as Clay County Produce Co. v. Western Union Telegraph Co., 61 I. C. C., p. 451, said:

"In order that we might be informed whether the general practice of the Western Union, defendant in the Unrepeated Message case, was in conformtiy with its published rules and also to obtain further information relative to the reasonableness of the rules, that proceeding was set down for further hearing. Further hearing was had on February 20, 1918."

It appears that on August 1, 1918, the President assumed control of the defendant company and it remained in the hands of the Government until August 1, 1919. For this reason the consideration of the evidence taken at the hearing of February 20, 1918, was held in abeyance. Thereafter, on March 1, 1920, a further hearing was had to ascertain whether changes had been made in the practices of the company since the former hearing and to afford an opportunity to parties interested to present new facts bearing on the propriety of the rules.

It further appears from the decision above referred to that, although the Western Union Telegraph Co. had promulgated the rule limiting liability for damages in cases of unrepeated messages to the amount of toll paid for the message, its practice for a long number of years had been to pay the actual damages sustained and that the company availed itself of the rule only in those cases where the claim was without foundation, or was unusually large.

It further appears from the opinion that prior to 1910 the rule was never observed and all claims for damages were referred to and dealt with by the Legal Department without reference to limited liability.

In 1913, after the Amendment, claims were settled according to the discretion of the superintendents, or managers. Since then adherence to contractual limitations was not required and the restricted-liability provisions were not resorted to in the case of meritorious claims which were reasonable in amount.

Referring to the practice of the Company settling meritorious claims, the Commission said:

"That practice as heretofore stated, contemplates full payment of claims by general superintendents, or general managers, up to $500.00, without submission to the

Legal Department and without reference to the contractual defenses."—61 I. C. C. p. 549.

In summing up the Commission said:

"Upon consideration of the record we find that the present rules of the respondents restricting their liability for negligence in the transmission or delivery, or for non-delivery, of unrepeated and repeated interstate messages are, and for the future will be, unreasonable."—61 I. C. C. p. 550.

The decision of the Interstate Commerce Commission declaring the regulation as to unrepeated messages unreasonable was rendered May 3, 1921 (61 I. C. C. 645). The original judgment in favor of Respondent against Petitioner was rendered September 29, 1925 (R. 24), more than four years after the rule invoked by Petitioner had been declared unreasonable. As shown by the findings in the Unrepeated Message Cases, from which we have quoted above, the facts upon which the rule had been declared unreasonable had existed for a long time prior to December 16, 1919, the date the message in the case at bar was sent. At that time and prior thereto, as shown by the findings of the Interstate Commerce Commission ,it was the uniform practice of the Western Union Telegraph Company to settle all meritorious claims where the damages claimed were less than $500.00. This was the practice continuously up to the decision of the Interstate Commerce Commission of May 3, 1921. At the same date the Commission adopted a regulation which fixed the maximum amount of liability in cases of unrepeated messages at $500.00. This was in accordance with the practice of the Western Union Telegraph Company covering a long period of years whereby they settled meritorious claims of less than $500.00 upon the principles of equity and justice. In adopting the regulation, the Commission simply declared what had really been the rule of the Western Union Telegraph Company for a long number of years. In declaring that the rule limiting liability to the value of the toll paid where the message was not repeated was unreasonable, the Interstate Commerce Commission simply gave effect to what the telegraph company had really, by its action and practice, declared for a long number of years. The action of the Commission, in fixing the

maximum amount of liability at $500.00 where the message was not repeated, based, as it was, on the usage of the telegraph company over a long number of years, was a declaration, in effect, that the Company, in settling claims upon their merits and according to justice and equity, was right. It would be a travesty on justice to say that under these facts the Petitioner should be allowed to interpose as a defense a regulation which, in cases where the claim was just and less than $500.00, it had uniformly disregarded for a long period of years prior to the time the message in the case at bar was sent. Surely the courts should not allow it to take advantage of its own wrong by invoking the letter of a regulation and claiming that it had the force and effect of law, although the facts showing it to be unreasonable and upon which it was declared unreasonable were in existence prior to the sending of Respondent's message. It has always been the policy, and rightfully so, of our courts to give effect to the spirit rather than the letter of the law, "for the letter killeth, but the spirit giveth life." Second Corinthians, Chap. 3, 6.

It is true that it was held in the case of Western Union Telegraph Co. v. Czizek, 264 U. S. 285, that the rules prescribed by the Commission were to take effect on July 18, 1921, and that they were not retroactive. But this in no way affects our contention. The amount of the judgment in that case was $4500.00. Respondent is not insisting that he is entitled to his recovery under the new regulation adopted by the Interstate Commerce Commission to take effect July 13, 1921. His insistence is that at the time of the adoption of this rule the Interatate Commerce Commission also declared that the rule or regulation of the telegraph company limiting its liability to the toll paid was unreasonable, and that by reason of this finding, based upon facts which were in existence at the time Respondent's message was sent, the rule was unreasonable and inoperative as to Respondent. If the facts upon which the rule was declared unreasonable existed at the time Respondent's message was sent, the regulation was of course unreasonable at that time. The finding of the Commission was merely the announcement of a condition that had existed for a long number of years. It was analogous to the decision of a Court declaring a law unconstitutional. The

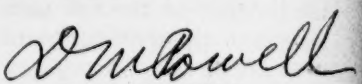
decision in such case would not only be effective at the time it was rendered, but it would relate back and destroy all rights that might have been claimed or asserted under the void Act prior to the decision. The very language of the amendatory Act of June 18, 1910 (36 Stat. L. 539, 545-6) is to the effect that the charges of the telegraph company must be reasonable, and if unjust or unreasonable, they are unlawful, and that the different rates to be charged for messages must also be just and reasonable.

We therefore respectfully insist that the regulation invoked by petitioner was unreasonable at the time the message was sent, and having been so declared by the Interstate Commerce Commission more than four years prior to the trial of the case in the Court below, Petitioner could not invoke it as a defense.

No matter of right authorizing the exercise of sound judicial discretion in Petitioner's behalf is here involved. The damages claimed by Respondent were less than $500.00. Under the rulings and orders of the Interstate Commerce Commission the questions here involved, the amount in controversy being less than $500.00, cannot arise in the future. Morally and legally the petition is without merit. Respondent's claim was small, but meritorious. Petitioner deserves no credit for its persistent efforts to defeat it. It has delayed payment more than eight years, has put Respondent to the annoyance and expense of three jury trials, as well as three appeals, and now is forcing him to the further expense of defending his claim before the highest Court of the Nation.

We respectfully insist the petition should be denied.

Respectfully submitted,



D. M. POWELL,
Attorney for Respondent.

POWELL & HAMILTON,
of Greenville, Alabama,
Of Counsel.